BLANK

PAGE

In the
Supreme Court of the United States
October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

F. J. Melia
James A. Wilcox
H. Lustgarten, Jr.
1416 Dodge Street
Omaha, Nebraska 68102
Counsel for Respondent.

October 1, 1966

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

BLANK

PAGE

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Summary of Argument	13
Argument	18
I. The Adjustment Board has Both the Jurisdiction and Duty to Consider all Facts and Issues Necessary to a Complete Disposition of the Dispute.	23
A. This Court in the Pitney and Slocum Cases has Determined the Jurisdiction and Obligation of the Adjustment Board to Hear and Determine Interunion Work-Assignment Disputes.	25
B. There is no Conflict Between the Court of Appeals' Decision and This Court's Decision in Whitehouse and Carey.	32
C. The Adjustment Board has Jurisdiction and Whatever Authority is Necessary to Resolve Work-Assignment Disputes.	37
D. The Exercise of Adjustment Board Jurisdiction Cannot be Controlled by the way TCU Framed the Issues.	44
E. "Overlapping Contracts" Assigning the Same Work to Different Groups of Employes are not Possible under National Labor Policy.	49
F. Neither the Divisional Arrangement nor the Bipartisan Structure of the Adjustment Board Impairs the Exercise of Jurisdiction Over Both	

INDEX—Continued

Page

Parties to an Interunion Work-Assignment Dispute. 54

G. Nothing in the Railway Labor Act, the Structure of the Adjustment Board nor Section 10(k) of the National Labor Relations Act Negates the Jurisdiction of the Adjustment Board Over Work-Assignment Disputes. 60

1. Section 3, First (i) and (j) Contemplate That the Adjustment Board Would Have Jurisdiction to Consider and Resolve Interunion Work-Assignment Disputes. 60

2. The Differences in Section 10(k) of the NLRA and the Structure of the NLRB do not Negate the Congressional Intent That the Adjustment Board Should Also Have Jurisdiction to Adjudicate Work-Assignment Disputes. 63

II. BRC was an Indispensable Party to TCU's Action to Enforce Adjustment Board Award 9988..... 65

A. BRC has a Real and Substantial Interest Which Could be Directly Affected by This Case. 67

1. Enforcement of Award 9988 as Sought by TCU Would Require a Transfer of Work From Clerks to Telegraphers. 67

2. The Clerks Have a Substantial Interest in any Action Which Could Deprive Them of Work. 67

B. The Limitations of the Gunther Case and P. L. 89-456 do not Affect BRC's Indispensability. 71

C. BRC's Presence in the Enforcement Action

INDEX—Continued

Page

was Necessary to Protect Union Pacific in its Compliance With any Decree or Judgment. 74

Conclusion 76

Appendix A 1a

Appendix B 18a

Appendix C 21a

TABLE OF CITATIONS

Cases: Page

Allain v. Tummon, 212 F. 2d 32 (CA-7, 1954) 47, 68, 75

Brennan v. Delaware, L. & W. R. Co., 103 N. E. 2d 532, 303 N. Y. 411 (NY-1952), cert. den. 343 U. S. 977 (1952) 31, 62

Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33 (1963) 24, 64

Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co., 199 F. 2d 384 (CA-5, 1952) 31

Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 62 L. R. R. M. 2828 47

Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30 (1957) 64

Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768 (1952) 40, 41, 58

Brotherhood of Railroad Trainmen v. Swan, 214 F. 2d 56 (CA-7, 1954) 56

Brotherhood of Railroad Trainmen v. Templeton, 181 F. 2d 527 (CA-8, 1950) 56, 68

TABLE OF CITATIONS—Continued

Page

Brotherhood of Railroad Trainmen v. Toledo P. & W. R. Co., 321 U. S. 50 (1944) 27

Carey v. Westinghouse Electric Corp., 375 U. S. 261 (1964) 19, 31, 32, 33, 34, 35, 36, 37

Div. No. 14, Order of Railroad Tel. v. Leighty, 298 F. 2d 17 (CA-4, 1962), cert. den. 369 U. S. 885 42

Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 (1945), affirmed on rehearing, 327 U. S. 661 (1946) 23, 24, 38, 39, 40

Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927) 36

Fitzgerald v. Haynes, 241 F. 2d 417 (CA-3, 1957) 76

General Committee, B. L. E. v. M-K-T R. Co., 320 U. S. 323 (1943) 27, 41, 42, 52, 59, 62

Green v. Brophy, 110 F. 2d 539 (CA-D. C., 1940) 68

Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U. S. 257 (1965) 17, 24, 51, 71, 72, 74

Humphrey v. Moore, 375 U. S. 335 (1964) 58

Hunter v. Atchison, T. & S. F. Ry. Co., 171 F. 2d 594 (CA-7, 1948) 47, 68

International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc., 335 F. 2d 216 (CA-9, 1964), cert. den. 379 U. S. 999 (1965) 49, 54

International Brotherhood of Firemen and Oilers v. International Assn. of Machinists, 338 F. 2d 176 (CA-5, 1964) 37

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332 (1944) 52

John Wiley & Sons v. Livington, 376 U. S. 543 (1964) 50, 51

TABLE OF CITATIONS—Continued

Page

Kirby v. Pennsylvania R. Co., 188 F. 2d 793 (CA-3, 1951) 75

Langnes v. Green, 282 U. S. 531 (1931) 66

Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks, 188 F. 2d 302 (CA-7, 1951) 44

Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al., 26 L. R. R. M. 2237 (DC-Ill., 1950) 22

Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al., 128 F. Supp. 331 (DC-Ill., 1954) 22, 23, 31, 59

National Labor Relations Board v. Local 19, International Bro. of Longshoremen, 286 F. 2d 661 (CA-7, 1961), cert. den. 368 U. S. 820 52

National Labor Relations Board v. Local 1291, International Longshoremen's Association, 345 F. 2d 4 (CA-3, 1965), cert. den. 382 U. S. 891 (1965) 49, 62

National Labor Relations Board v. Radio & Television Broadcast Engineers Union, 364 U. S. 573 (1961) 31, 32, 39, 49, 54, 64

New York Central R. Co. v. Brotherhood of Locomotive Firemen, 355 F. 2d 503 (CA-7, 1966) 31, 39

Order of Railway Conductors v. Pitney, 326 U. S. 561 (1946), reh. den. 327 U. S. 814 ..... 11, 14, 25, 26, 27, 28, 29, 31, 43, 62

Order of Railway Conductors v. Swan, 329 U. S. 520 (1947) 55

Order of Railway Conductors v. Switchmen's Union of N. A., 269 F. 2d 726 (CA-5, 1959) 60

Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E. D.-Mo., 1945), vac. and

TABLE OF CITATIONS—Continued

Page

rem. 156 F. 2d 1 (CA-8, 1946), cert. den. 329 U. S. 758, reh. den. 329 U. S. 829 18

Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co., 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997 ..... 31, 67, 69, 70, 71

Order of Railroad Telegraphers v. Ry. Express Agency, 321 U. S. 342 (1944) 27, 52

Order of Railroad Telegraphers v. Southern Pacific Company, No. Civ. 4812-Phx. 9

Seaboard Air Line R. Co. v. Castle, 170 F. Supp. 327 (DC-Ill., 1958) 57

Shields v. Barrow, 21 U. S. 409, 17 How. 130 (1854) 66, 76

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (1950) 11, 14, 25, 27, 28, 29, 30, 43, 62

Southern Pac. Co. v. Joint Council Dining Car Employees, 165 F. 2d 26 (CA-9, 1948) 39, 40

Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332 (CA-9, 1965), on reh. 356 U. S. 336 60

Stark v. Wickard, 321 U. S. 288 (1944) 27

State of California v. Southern Pac. Co., 157 U. S. 229 (1895) 76

Steele v. Louisville & N. R. Co., 323 U. S. 192 (1944) 40, 41, 58

Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237 (1935) 66

Switchmen's Union of N. A. v. Nat. Mediation Board, 320 U. S. 297 (1943) 27, 41

TABLE OF CITATIONS—Continued

Page

Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al., 281 U. S. 548 (1930) 51

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 49

Thomas v. New York, Chicago & St. Louis R. Co., 185 F. 2d 614 (CA-6, 1950) 39

Truax v. Raich, 239 U. S. 33 (1915) 68

U. S. v. American Ry. Exp. Co., 265 U. S. 435 (1924) 66

U. S. Pipe and Foundry v. National Labor Relations Board, 298 F. 2d 873 (CA-5, 1962), cert. den. 370 U. S. 919 52

Union Railroad Co. v. National Railroad Adjustment Board, 170 F. Supp. 281 (DC-Ill. 1958) 57

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960) 43

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937) 15, 51, 52, 60

Washington v. U. S., 87 F. 2d 421 (CA-9, 1936) 67

Whitehouse v. Illinois Central R. Co., 349 U. S. 366 (1955) 32, 33, 34, 35, 36

Statutes and Rules:

Federal Rules of Civil Procedure:

Rule 14(a) 10

Rule 19 66

Rule 19(b) 10

Public Law 89-456, 80 Stat. 208 ..... 11, 17, 71, 72

Railway Labor Act of 1926, 44 Stat. 577 23

TABLE OF CITATIONS—Continued

Page

Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151-164:

Section 2, Ninth 20, 37, 41, 42, 62

Section 3, First (a) 57, 58

Section 3, First (c) 57, 58

Section 3, First (i) 6, 11, 26, 41, 42, 60, 61, 63

Section 3, First (j) 7, 8, 13, 16, 32, 33, 56, 59, 60, 61, 62, 63, 71, 73, 75

Section 3, First (k) 39, 61, 63

Section 3, First (l) 7, 9, 24, 32, 39, 61, 63

Section 3, First (m) 9, 73

Section 3, First (p) 4, 10, 11, 66

Section 3, First (q) 11

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. §§ 151-168:

Section 10(k) 60, 63, 64

Section 301 35

Miscellaneous:

Moore, Federal Practice, Vol. 3 (1966 Special Supplement) 66

National Railroad Adjustment Board, First Division Award 20038, 149 N. R. A. B. (1st Div.), 322 48

National Railroad Adjustment Board, Third Division

Award 8258, 79 N. R. A. B. (3d Div.), 829 7

Award 8656, 83 N. R. A. B. (3d Div.), 337 ..... 7, 9, 70, 73

Award 9988, 96 N. R. A. B. (3d Div.), 286 ..... 4, 9, 10, 16, 44, 45, 65, 67, 68, 71

TABLE OF CITATIONS—Continued

Page

Kaufman, *Representation in the Railroad Industry,* Lab. L. J., July, 1955 19

Thirteenth Annual Report of the National Mediation Board (1947) 20

Report of the Vice Presidents of the Order of Railroad Telegraphers to the Thirty-Sixth Regular and Third Quadrennial Session of the Grand Division, Miami Beach, Florida, June, 1964 45

Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill., June, 1960 5

National Labor Relations Board
Cases Nos. 5-RM-422, 5-RM-500, 5-RC-1670, 5-UC-3 35

BLANK

PAGE

In the
Supreme Court of the United States
October Term, 1966

No. 28

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,[1]

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENT

Respondent, Union Pacific Railroad Company, for the reasons herein detailed submits that the judgment of the United States Court of Appeals for the Tenth Circuit in that court's case No. 7968 is correct and should be affirmed by this Court.

---

[1] Formerly "The Order of Railroad Telegraphers."

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (R. 78)[2] is reported at 231 F. Supp. 33. The opinion of the court of appeals dated July 22, 1965, is not officially reported but is found at 59 L. R. R. M. 2993. That court's opinion dated October 8, 1965 (R. 90), in which it withdrew its prior opinion, is officially reported at 349 F. 2d 408 and unofficially reported at 60 L. R. R. M. 2244.

JURISDICTION

The jurisdictional requisites are set forth in the petitioner's brief (Br. 2).

QUESTIONS PRESENTED

(1) Whether the National Railroad Adjustment Board in deciding an interunion work-assignment jurisdictional dispute must consider and determine the entire dispute or controversy including the contracts, usage, practices and customs of both claiming unions where the union representing employes performing the disputed work was determined by the Board to be involved and given notice of the proceeding but, in pursuance of an agreement of all railroad unions declined to participate therein but has stated that if as a result of the Adjustment

---

[2] "R." refers to the printed transcript of record; "Br." refers to the brief of petitioner; and "RLEA" refers to the brief filed by Railway Labor Executives' Association as *amicus curiae*.

Board proceedings any work is taken away from employes it represents, redress will be sought by it in separate proceedings against the railroad.

(2) Whether, in an action brought in a U. S. District Court to enforce an award of the National Railroad Adjustment Board sustaining the claim of the union representing telegraph employes to certain work which is being performed by clerical employes the union representing clerical employes performing the disputed work is an indispensable party to such action where, in addition to monetary penalties, a coercive decree is sought which would take the disputed work from clerical employes, and where there may be questions as to the validity or enforceability of such award which might be raised and decided in such action.

STATUTES INVOLVED

The pertinent sections of the Railway Labor Act, as amended, 44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U. S. C. §§ 151-164, the National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§ 151-168, and Rule 19 of the Federal Rules of Civil Procedure, before and after revision, are set forth in Appendix A, *infra* at p. 1a.

STATEMENT OF THE CASE

We believe that a somewhat more complete statement of the facts of this case than appear in petitioner's brief will contribute to an understanding of the issues.

This case is here on certiorari from the decision of the Court of Appeals for the Tenth Circuit affirming the dismissal of the action by the United States District Court at Denver, Colorado. It is a statutory action brought by petitioner, Transportation-Communication Employees Union (the "TCU"), under Section 3, First (p) of the Railway Labor Act to enforce Third Division Award 9988 (96 N. R. A. B. (3d Div.) 286; R. 5-70), of the National Railroad Adjustment Board (the "Adjustment Board").

In 1952, Respondent, Union Pacific, installed IBM office machines in its various railroad yard offices which radically changed the procedure of maintaining car records—work which had been traditionally performed by clerical employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (the "BRC"; R. 3). In the operation of these machines, a communication function previously performed manually by telegraph employes, represented by TCU, is automatically performed when the machines handle the clerical work previously performed manually by clerical employes.

TCU Grand President Leighty described the operation of these machines as follows:

> "* * * The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which can combine the work of the clerical employe, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the tele-

> grapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation." Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill., June, 1960, page 192, quoted in Third Division Award 9988 (R. 60).

The basic function of the IBM machines was the performance of clerical work and clerical employes were assigned the work of punching IBM cards and operating the machines.

TCU filed a grievance, called a "claim" in the railroad industry, asserting that the performance of such work, including the card punching, belonged exclusively to telegraph employes, that its assignment to and performance by clerical employes was in violation of the collective agreement betweeen TCU and Union Pacific, and that such work should be assigned to telegraph employes (R. 3, 5-7). TCU also sought penalty payments consisting of eight hours' pay for each eight-hour shift, both day and night, since August 25, 1952, and continuing "until such time that this work is properly assigned to such [telegraph] employes [R. 5, 7]."

The claim as framed by TCU purported to seek a declaration that the Telegraphers' Agreement gave the telegraph employes the exclusive right to the perform-

ance of the work on the IBM machines. It was not, however, the type of breach of contract action familiar to the courts. TCU relied upon the so-called "scope rule" of the agreement. This rule simply lists positions which are to be covered by the agreement (R. 14). It does not define the duties of the positions listed. Other rules of the agreement advanced by TCU as supporting its claim to the exclusive performance of the work are set forth in the record (R. 14-16). They are all administrative provisions and do not even purport to define duties or grant work. Nor did TCU argue to that effect (R. 16-18).

Two claims were filed by TCU, one involved the work assignment at Las Vegas, Nevada, and the other at Salt Lake City, Utah (R. 33, 52).[3] These claims were ultimately filed as separate disputes with the Adjustment Board by TCU under Section 3, First (i) of the Act. The records in the two dockets were identical insofar as the work-assignment dispute was concerned. The factual statements and argument of TCU and Union Pacific concerning the work-assignment dispute were set forth in the docket covering the dispute at Salt Lake City and were incorporated by reference in the Las Vegas docket (R. 46).

In both disputes, Union Pacific contended that since the objective of TCU's claims was the taking of work from clerical employees they were "involved" and that the Adjustment Board would be without jurisdiction unless they or their collective representative, BRC, were notified and permitted to participate as required under

---

[3] Claims were also filed covering various other points. Only the Las Vegas and Salt Lake claims were progressed to the Adjustment Board.

Section 3, First (j). TCU denied that the clerks had any interest in the dispute.

The Salt Lake City and Las Vegas disputes, although filed with the Adjustment Board at the same time, became separated and the Salt Lake City dispute was reached first. The Adjustment Board refused to notify BRC of the dispute because of the refusal of the labor members.[4] The Adjustment Board deadlocked and a referee was appointed under Section 3, First (1). In Award 8258, 79 N. R. A. B. (3d Div.) 829, 864, the Adjustment Board held that BRC was in fact "involved" and refused to proceed to a consideration of the merits until notice had been given "to the *parties,* Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks."

As a result the Adjustment Board gave notice of the dispute to BRC and with the same referee sitting, again considered the dispute, and on January 12, 1959, rendered Award 8656 in which it held that the disputed work was properly assigned to and performed by the clerical employes and that TCU's agreement was not violated by such assignment. 83 N. R. A. B. (3d Div.) 337.

More than two years later, the same work-assignment dispute, but the claim which arose at Las Vegas, was considered by the Adjustment Board. In the meantime,

---

[4] At that time, it was the policy of the various railroad labor organizations and, of course, followed by the labor members on the Adjustment Board in work-assignment jurisdictional disputes to refuse to give notice under Section 3, First (j) and to prohibit participation in Adjustment Board proceedings by anyone except the involved railroad and the petitioning union. *Whitehouse v. Illinois Central R. Co.*, 349 U. S. 366, 372 (1955); *Allain v. Tummon*, 212 F. 2d 32, 35 (CA-7, 1954). This policy is detailed in Appendix B, *infra*, p. 18a, containing excerpts from the Findings of Fact entered in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, 128 F. Supp. 331 (DC-Ill., 1954).

the various railroad labor organizations affiliated together as the RailwayLabor Executives' Association (the "RLEA") had changed their policy and had agreed that in these work-assignment disputes, "third party" notices to the other union should be issued by the Adjustment Board. The RLEA prescribed a form letter to be used as a reply by any union so notified, and it was agreed that such union would "not otherwise appear or participate in the proceeding."[5]

Thus, in the Las Vegas dispute, the Adjustment Board, as required by Section 3, First (j), found BRC to be an "involved" party and notified it of the dispute, advising that it could "appear and file papers and documents [R. 75]." BRC President George M. Harrison wrote the Adjustment Board the RLEA-prescribed letter (R. 76; Appendix C, *infra,* p. 21a) in which he stated that it was his "understanding" that the dispute was simply one between TCU and Union Pacific involving an interpretation of TCU's agreement with Union Pacific and that neither BRC nor the clerical employes it represented were involved. He also asked the Adjustment Board to advise him if his "understanding of the nature of the dispute" were incorrect. (The Adjustment Board did not answer his letter.) The letter also stated that the rights

---

[5] This policy understanding is set forth in Interrogatory No. 1 and Answer thereto in Interrogatories to the Plaintiff dated December 9, 1964, and Answers dated December 18, 1964, filed in *The Order of Railroad Telegraphers v. Southern Pacific Company,* No. Civ. 4812-Phx., pending in the U. S. District Court for the District of Arizona. A certified copy of these documents has been lodged with the Clerk of this Court. At the oral argument before the court of appeals below, these documents were accepted by and were before that court after counsel for TCU had stated he had no objection. The policy declaration referred to and attached to the Answers to the Interrogatories is reproduced in Appendix C, *infra,* p. 21a.

of Union Pacific clerical employes were "predicated" upon BRC's agreement with Union Pacific. However, in recognition of the fact that resolution of TCU's claim might adversely affect clerical employes, President Harrison stated that if as a result of the Adjustment Board proceedings any *"work* covered by such [BRC] agreement"[6] was taken from clerical employes, BRC would proceed separately against Union Pacific before the Adjustment Board "to correct any such violation of our agreement [R. 77]." BRC did not further participate in the dispute.

Award 8656, covering the work-assignment dispute at Salt Lake City, held the work was properly assigned to clerical employes and that TCU's agreement had not been violated thereby. Under Section 3, First (m) of the Railway Labor Act this determination was "final and binding" on TCU. Yet the Adjustment Board in the same work-assignment dispute at Las Vegas but with a different referee[7] rendered Award 9988 in which it sustained TCU's claim that such assignment violated the TCU agreement, finding that the work was improperly assigned to clerical employes and that such work should be assigned to telegraph employes. The Adjustment Board also directed that Union Pacific should pay the "senior idle employe covered by the Telegraphers' Agreement" a day's pay for each 8-hour shift since October 5, 1952, when the machines at Las Vegas were used (R. 51). There is no indication in the Adjustment Board's opinion

---

[6] Throughout this brief, all emphasis is supplied unless indicated otherwise; also, footnotes will be omitted from all quotations.

[7] Adjustment Board referees are appointed on an *ad hoc* basis. Section 3, First (1).

that it considered the BRC Agreement, or the custom, practices or claims thereunder (R. 47-50).[8]

Union Pacific did not comply with Award 9988 and TCU filed this enforcement action under Section 3, First (p) of the Railway Labor Act in the District Court for the District of Colorado. In its prayer for relief TCU asked that the court enforce the award "by writ of mandamus or otherwise" and, in addition, that Union Pacific be ordered to "make an accounting of all monies due" under the award (R. 4).

The District Court sustained Union Pacific's motion to dismiss, finding that the Adjustment Board had made BRC a party to the board proceedings and holding BRC to be indispensable to the enforcement action (R. 85).[9] Although given the opportunity, TCU refused to make BRC a party defendant and final judgment of dismissal was entered (R. 87) from which an appeal was taken to the United States Court of Appeals for the Tenth Circuit.

In an opinion dated July 22, 1965, the court of appeals found that the Adjustment Board had failed to construe TCU's contract with regard to, and with reference

---

[8] The court below found that the Adjustment Board considered TCU's contract as if BRC's contract did not exist (R. 94).

[9] In the district court, TCU suggested Union Pacific should have utilized the third party procedures provided under Rules 14(a) and 19(b) of the Federal Rules of Civil Procedure. But it was shown that the dispute involved work being performed by clerical employees at Las Vegas, Nevada, and the unit of BRC which represented clerical employes at Las Vegas was limited geographically to the territory from Ogden, Utah, to Los Angeles, California. TCU did not pursue the point in the court of appeals below. Under Section 3, First (p), TCU could have brought its enforcement action—

> "* * * in the District Court of the United States for the district in which he [petitioner] resides or in which is located the principal operating office of the carrier or through which the carrier operates."

to BRC's contract and position and vacated the award. The court remanded the case to the Adjustment Board to hold "a complete hearing" which should "include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." 59 L. R. R. M. 2993, 2996.

On October 8, 1965, the court below withdrew its prior opinion and judgment,[10] substituting therefor a different opinion and judgment (R. 90) in which it affirmed the district court's judgment of dismissal for lack of an indispensable party and also because the Adjustment Board had failed to properly exercise its primary jurisdiction (R. 96). The court pointed out that if BRC had been joined in the enforcement action "the matters relating to their [BRC] position and contract could have been presented to the court thereby filling the same void we find to exist [R. 96]."

The court of appeals recognized this case as "but another episode in the long-standing jurisdictional struggle" between BRC and TCU (R. 91). It found that the authority and jurisdiction of the Adjustment Board over this type of a work-assignment dispute under Section 3,

---

[10] Union Pacific had filed a petition for rehearing limited to the question of the jurisdiction of the court to remand the case to the Adjustment Board under Section 3, First (p) and a motion for permission to file it out of time. The court below did not act on these further pleadings. At that time Section 3, First (p) empowered district courts to "enforce or set aside" Adjustment Board orders. Effective June 20, 1966, Public Law 89-456 was enacted and district courts are now given specific jurisdiction in enforcement actions "to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." P. L. 89-456, Section 2(a), now Section 3, First (q) of the Railway Labor Act, Appendix A, *infra*, p. 12a.

First (i) was clearly established in the *Pitney* and *Slocum* cases.[11] It also said that "it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks' Union [R. 93]." The notice requirement, the court said, is derived from the "scope and nature of the issues before the Board [R. 94]," rejecting any idea that scope and nature of the issues which are involved in a work-assignment dispute are to be derived only from the manner in which TCU might frame its claim. The court below pointed out that:

> "This 'concern' is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose [R. 94]."

According to the court of appeals "the fundamental issues before the Adjustment Board included those pertaining to the Clerks and to their contract" and that "the Clerks for all practical purposes thereby become parties to the administrative proceedings [R. 95-96]." With the real issues of the interunion dispute thus defined and the Adjustment Board's jurisdiction established, it follows that "the Adjustment Board must exercise" its authority "over the whole dispute at one time, not half at one time

---

[11] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946), and *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

with one set of participants, and half at another [R. 95]." Since the Adjustment Board decided telegraph employes' rights with reference only to TCU's agreement, the court held the Adjustment Board had failed to decide the entire dispute presented for decision and thus had failed to meet the responsibilities of its primary jurisdiction. The dismissal of the case by the trial court was affirmed (R. 96).

SUMMARY OF ARGUMENT

I. The basic question here presented concerns the jurisdiction and duty of the Adjustment Board to hear and decide a jurisdictional work-assignment dispute involving two groups of employes represented by different unions (BRC and TCU) as to which group should be assigned to perform certain work being performed by clerks represented by BRC.

The fact that while the dispute submitted by TCU to the Adjustment Board was framed so as to purport to be only a two-party dispute between TCU and Union Pacific, it was, in fact, an attempt by TCU to secure for employes it represents work which was assigned to clerical employes represented by BRC. BRC was involved in the dispute which was recognized by the Adjustment Board in giving BRC the notice required by Section 3, First (j) of the Railway Labor Act, in effect, making BRC a party to the proceeding. While BRC declined to participate in the proceeding, pursuant to an understanding with TCU and other railroad unions, it advised the Board that it

would progress a separate claim against the railroad if its interests were affected. The Board then decided the dispute on the basis of its interpretation of the TCU agreement and as if BRC's agreement and practices thereunder did not exist. The court of appeals below properly held that in such circumstances the Adjustment Board failed to properly exercise its jurisdiction and resolve the entire dispute.

The Adjustment Board was created under Section 3 of the Railway Labor Act to hear and determine all disputes in the railroad industry of a "minor" nature, i.e., disputes arising out of grievances or the interpretation and application of collective bargaining agreements. Under that section of the Act it was empowered and obligated to consider the interests of all parties involved and to render a final award resolving the entire controversy as to all such parties. This Court in *Order of Railway Conductors v. Pitney,* 326 U. S. 561 (1946), reh. den. 327 U. S. 814, and *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239 (1950), held that the Adjustment Board had the jurisdiction and obligation to resolve such interunion work-assignment disputes of this precise nature.

TCU' objections to the decision of the Circuit Court of Appeals is essentially premised upon the theory that under ordinary contract law, the railroad could have bound itself by so-called "overlapping contracts" granting the same work to different unions, and that its claim involves simply an action for money damages under its own contract without any relationship to the contractual rights of BRC. This is not possible, however, under the

National Labor Policy as expressed in the labor statutes. This Court has many times recognized that neither the common law nor commercial contract law is controlling in the field of labor contracts. A collective bargaining agreement is a "code" of conduct which cannot be treated as an ordinary private agreement.

Under the Railway Labor Act a railroad is not free to contract with whomever it chooses, but is obligated to bargain only with the employes' true representative and no other. *Virginian Ry. Co. v. System Federation No.* 40, 300 U. S. 515 (1937). Since there is but one job, if one union has properly secured a contract for the performance of such work, any attempt to contract the same work to another union would be contrary to the mandate and purposes of that Act.

Nor is it possible to avoid what is in reality a dispute between two unions as to which should have jurisdiction over a given type of work merely by framing a grievance in the form of a claim for money damages for breach of a single contract. The real issues of the dispute must be determined from a consideration of the actual purposes and effects and not merely from the form chosen by the claimant.

Neither is there validity to TCU's contentions that a limited scope of powers and inappropriate structure of the Adjustment Board should preclude its exercise of such jurisdiction. The scope rules in the agreements involved in these work-assignment disputes, like TCU's agreement involved here, normally contain no specific

contractual grants of work, but rather a list of positions to be interpreted against the background of custom, usage and practice. Resolution of allegedly conflicting agreements therefore would normally not require anything more than an interpretation of the agreements each in the light of the other.

The Adjustment Board's powers are not so limited. Despite the fact that the Act does not specify what powers it should exercise or what standards it should employ, it still has the responsibility and duty to establish such procedure and exercise such authority as may be necessary to meet its statutory obligations. The potential difficulties with the Board's structure which TCU purports to anticipate would not be the result of statutory limitations, but something which the Board and the parties could avoid by proper action under the statutory provisions.

II. TCU, in its action to enforce Award 9988 of the National Railroad Adjustment Board, did not join BRC which represents the clerical employes presently performing the work awarded to TCU employes by that Award. In addition to the fact that a prior award had held that such work was properly assigned to BRC employes, they have at least a possessory interest in such work which is entitled to protection in the enforcement action.

In recognition of BRC's interest, the Adjustment Board gave BRC the formal notice required by Section 3,

First (j) of the Railway Labor Act and in effect made it a party to the proceedings.

TCU's action to enforce the Award sought an actual transfer of the work, but even an enforcement of the money claim alone would have the effect of ousting the BRC employes from their jobs.

Despite the subsequent decision of this Court in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965), and the enactment of P. L. 89-456, there are a number of important issues in which the BRC would have had a valid interest and a right to have adjudicated in the enforcement action. Union Pacific also has an enforceable right that BRC have the opportunity to raise and have adjudicated any issues in which it might have an interest in order that it will thereby be bound and Union Pacific protected in its subsequent compliance with any judgment or decree issued in the enforcement action.

Clearly BRC's presence in the enforcement action was therefore indispensable, and TCU's refusal to join BRC, after being afforded an additional opportunity to do so by the district court, justified the dismissal of the action.

ARGUMENT

Introductory

There is involved in this case a dispute, between two competing unions, one representing clerical employes and the other telegraphers, as to which group of employes should be assigned to perform certain work. The dispute centers on the current problem resulting from automation and the critical question as to which group of employes will perform the work which remains after automation.

Even though the instant matter arises because of automation it is actually but a more recent facet of an old work-assignment dispute. For many years BRC has complained about the performance of clerical work by telegraphers. On the other hand, TCU maintains its right to the performance of some clerical work. The dispute has been pursued on many railroads. It became very severe during the depression in the late 1920s with the retrenchments in personnel. As early as 1932, BRC and TCU were in dispute over the performance of clerical work by telegraphers. This was two years before the 1934 amendments to the Railway Labor Act which established the National Railroad Adjustment Board. (61 F. Supp. 870) As the court below noted, this case is "another episode in the long-standing jurisdictional struggle [R. 91]" between BRC and TCU. The early history of this matter is detailed in the district court's opinion in *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 61 F. Supp. 869 (E. D.-Mo., 1945), vac. and rem. 156 F. 2d 1 (CA-8, 1946), cert. den. 329 U. S. 758, reh. den. 329 U. S. 829.

In 1944, the dispute reached the point that BRC filed formal charges against TCU with the Executive Council of the American Federation of Labor. BRC President George M. Harrison accused TCU "of invading our [BRC] work jurisdiction." (61 F. Supp. 873) After a hearing, the AFL issued its decision which stated:

> "The facts are clear that the Brotherhood [BRC] was granted jurisdiction over all railroad clerical work of the character above described and that the ORT [TCU] has invaded the work jurisdiction of the said Brotherhood granted by the American Federation of Labor. Their violation of clerks jurisdiction by the ORT cannot be excused because it has continued for some time. The very purpose of the A. F. of L. in granting work jurisdiction to International Unions would be defeated if their contention were accepted. It would breed non-respect for the rights of affiliation and induce industrial conflict that will inevitably result in work interception.
>
> "The Executive Council finds that the ORT is violating the jurisdiction of the Brotherhood of Railway Clerks, et al and instructs said ORT to confine its members to the work jurisdiction granted by the A. F. of L., and directs that any member of the ORT performing clerical work be disassociated from membership." (61 F. Supp. 874)

As this Court has observed,[12] "the term 'jurisdictional' is not a word of a single meaning." In the railroad industry there are two kinds of jurisdictional disputes. One type is the "representation dispute" which is between two unions as to which one will represent the employes in a craft or class.[13] An example would be a dispute

---

[12] *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261, 263.

[13] For general review of this type of dispute see Kaufman, *Representation In the Railroad Industry*, Lab. L. J., p. 437, July, 1955.

between the Brotherhood of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen over which union should be the designated and authorized representative of conductors on a certain railroad. Under Section 2, Ninth, of the Railway Labor Act this type of dispute is resolved by the National Mediation Board usually through an election except where "any other appropriate method of ascertaining the names of [the employes'] duly designated and authorized representatives" is followed, e. g., cross checks of employe authorizations against a railroad's payroll records. Where two unions are involved, the Mediation Board generally conducts an election; the "other appropriate method" being followed where only one union is involved.[14] Resolution of the representation dispute results in the original, or a change in, designation of the collective bargaining representative for the involved craft or class.

The other type of jurisdictional dispute is the "work-assignment dispute" where the conflict is between two groups of employes which are already represented by a different union with each group claiming the exclusive right to perform certain work. This is the kind of dispute involved here. The resolution of this kind of dispute does not result in any change in union affiliation nor in the designation of a different collective bargaining agent. Whatever the outcome of the work-assignment dispute, each group of employes would continue to have the same union as their collective representative. Settlement of this type of dispute would, however, result in an

---

[14] *Thirteenth Annual Report of the National Mediation Board* (1947), p. 10.

increase in the amount of work available to be performed by one group and a decrease for the other group.

This BRC-TCU dispute can appear as either type of jurisdictional dispute. The difference results from the manner in which the moving party for its own tactical advantage frames the issue. Thus, in the instant case TCU, had it desired, could have sought an election by applying to the National Mediation Board, and upon meeting certain requirements an election might have been held. It would have then been a representation dispute. Instead, however, TCU made this a work-assignment dispute by claiming that Union Pacific had violated the Telegraphers' Agreement in assigning the work to clerical employes. This careful framing of the claim gave the dispute the appearance of a simple run-of-the-mill common law breach of contract action over the interpretation of an agreement and involving only TCU and Union Pacific. Under this approach, TCU was able to argue that its dispute at the Adjustment Board did not involve BRC or the clerical employes who were performing the work.

This same type of tactic has been followed by both TCU and BRC on many railroads and its use over the years has lead the Adjustment Board to make conflicting awards involving the same work on the same railroad. A result which is squarely at war with one of the basic purposes of the Railway Labor Act—set forth in Section 2—to provide for the prompt and orderly settlement of *all* disputes growing out of grievances or the interpretation of agreements.

Both BRC and TCU employed this tactic against the Missouri-Kansas-Texas Railroad Company resulting in

long and protracted litigation but no resolution of the problem. That litigation points to the full reach of this case. A series of Adjustment Board awards were rendered in proceedings brought separately by TCU and BRC against the M-K-T each alleging a simple breach of their own agreement and each claiming the exclusive right to the performance of the same work. As a result, the Adjustment Board issued conflicting awards in which the Board found the same work had been contracted exclusively to both telegraphers and clerks. BRC and TCU ultimately filed separate enforcement actions in U. S. District Courts in Missouri and Texas seeking to compel M-K-T to comply with different awards but involving the same work. (128 F. Supp. 362)

At the Adjustment Board, because of the policy of the labor unions, neither union was notified of nor permitted to participate in the disputes filed by the other union. Faced with this dilemma and in an effort to have the matter resolved, M-K-T filed an action in the U. S. District Court at Chicago, Illinois, to enjoin the enforcement of the awards. A preliminary injunction was granted in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.,* 26 L. R. R. M. 2237 (DC-Ill., 1950), affirmed *sub nom. in Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 188 F. 2d 302 (CA-7, 1951). After a trial, TCU and BRC were enjoined from enforcing the awards and the Adjustment Board was directed to reopen and consolidate all of the cases allowing full participation, after notice, by all parties—TCU, BRC, and the railroad. (128 F. Supp. 331) The court directed that the Board should consider

the agreements of both BRC and TCU as well as the custom and practice thereunder. TCU and BRC appealed to the Court of Appeals for the Seventh Circuit, which they later dismissed.

It appeared that at last these work-assignment disputes which had plagued the M-K-T for years were to be finally decided in one proceeding with both TCU and BRC participating. (128 F. Supp. 331 at 372-375). The Adjustment Board pursuant to the district court's decree reopened the dockets and issued the required notice. Before the scheduled hearing was held, however, BRC and TCU withdrew all of these disputes from the Adjustment Board, thereby aborting any further Board action or possible resolution of the dispute.[15]

With only minor changes in details, this same story could be written as to many railroads.

I. THE ADJUSTMENT BOARD HAS BOTH THE JURISDICTION AND DUTY TO CONSIDER ALL FACTS AND ISSUES NECESSARY TO A COMPLETE DISPOSITION OF THE DISPUTE.

By amendments enacted in 1934, Congress replaced the unsuccessful voluntary procedures under Section 3 of the Railway Labor Act of 1926 (44 Stat. 577) for the settlement of disputes growing out of grievances and the interpretation and application of agreements in the railroad industry.[16] A compulsory procedure was enacted

---

[15] See Judge Minor's order in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, No. 50 C 684, dated June 24, 1958.

[16] These were denominated as "minor disputes," i. e., those over the meaning and application of agreements as distinguished from "major disputes" which relate to the making of collective agreements. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

which would assure that *all* of these minor disputes would be resolved. Congress' intent was clear—the new procedure was to be all-inclusive. It declared in Section 2 that it was a general purpose of the Act to avoid any interruption to commerce and to provide for the prompt and orderly settlement of *all* such disputes. It is clear from the legislative history that an orderly, certain and conclusive procedure was being provided.

The 1934 amendments, drafted by Joseph B. Eastman, the Federal Coordinator of Transportation, represented a victory for the railroad unions in their efforts to obtain a certain and conclusive method of settling all minor disputes by Adjustment Boards established on a national basis. *Elgin, J. & E. R. Co. v. Burley,* 325 U. S. 711, 727 (1945). It is the duty of the Board to agree upon an award in settlement of all disputes submitted to it. Where agreement is not reached by the Board itself, a neutral person or "referee" is to be selected either by the Adjustment Board or the National Mediation Board who is required to *"make an award."* Section 3, First (1).

In *Gunther v. San Diego & Arizona Eastern Ry. Co.,* 382 U. S. 257 (1965), this court pointed out:

> "* * * *The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world.* Its membership is in daily contact with workers and employers, and knows the industry's language, customs and practices."

Referring to its decision in *Locomotive Engineers v. Louisville & Nashville R. Co.,* 373 U. S. 33 (1963), the

Court went on to state:

> "* * * prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as *'compulsory arbitration in this limited field,'* p. 40, *'the complete and final means for settling minor disputes,'* p. 39, and *'a mandatory, exclusive and comprehensive system for resolving grievance disputes.'* P. 38."

A. This Court in the Pitney and Slocum cases has determined the jurisdiction and obligation of the Adjustment Board to hear and determine interunion work-assignment disputes.

The problem of interunion work-assignment disputes is not new to this Court, and it has consistently held that such disputes were within the jurisdiction of the Adjustment Board and were to be resolved by it.

Twenty years ago in *Order of Railway Conductors v. Pitney,* 326 U. S. 561 (1946), reh. den. 327 U. S. 814, this Court was faced with a "jurisdictional dispute involving the railroad and two employe accredited bargaining agents [p. 562]." It was held that the Adjustment Board was especially created to "interpret *contracts* such as these in order *finally to settle* a labor dispute [p. 565]."

Pitney involved a work-assignment dispute between the Order of Railway Conductors (ORC) and the Brotherhood of Railroad Trainmen (BRT) over the manning of certain yard engines. ORC filed suit in a U. S. District Court.

BRT intervened and the matter was referred to a master who found that the work should be assigned to BRT conductors. The court of appeals dismissed, af-

firmed by this Court on certiorari, on the basis that disputes of this nature were exclusively within the jurisdiction of the Adjustment Board. A determination of this type of dispute required an "interpretation of *these contracts*" and under Section 3, First (i), "the court should not have interpreted the *contracts* for purposes of finally adjudicating the dispute between the *unions* and the railroad."

Justice Black, speaking for the Court,[17] pointed out that "Congress thus designated an agency peculiarly competent to handle the basic question here involved [*Id.* at p. 566]," and:

> "* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. * * * *For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The

---

[17] The Court's decision in *Pitney* was unanimous with respect to the Adjustment Board's jurisdiction to resolve work-assignment disputes. While Justice Rutledge dissented on the basis of his view that the ORC was entitled to an injunction until the Board resolved the matter, he was otherwise wholly in agreement with the majority as shown in his dissent:

> "* * * This in turn will depend upon the effect which the Board finds should be given to the prior agreements, including not only the 1940 contract with O. R. C., but the basic agreements of 1927 and 1928 with O. R. C. and B. R. T., respectively, as affected by the establishment of switching limits in 1929 and other matters bearing upon the interpretation of the written contracts and the rights of the parties." (p. 569, n. 2)

> factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. * * *" (*Id.* at p. 567)

Citing *General Committee v. M-K-T R. Co.*, 320 U. S. 323;[18] *Switchmen's Union v. Board*, 320 U. S. 297; *Brotherhood of R. Trainmen v. Toledo P. & W. R. Co.*, 321 U. S. 50; *Order of R. Telegraphers v. Ry. Express Agency*, 321 U. S. 342.

A few years later in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), this Court was again faced with an interunion work-assignment dispute similar to that involved in *Pitney* and almost identical to that in this case. TCU and BRC each claimed under their separate agreements with the railroad certain jobs which the railroad had assigned to clerks. The railroad brought a declaratory judgment in a New York court, naming both TCU and BRC as defendants, seeking an interpretation of both agreements. The court interpreted the contracts in favor of BRC. The New York Court of Appeals af-

---

[18] The suggestion by *Amicus* RLEA that the rationale of *General Committee, B. L. E. v. Missouri-K-T R. Co., supra*, makes interunion work assignment disputes nonjusticiable by the Adjustment Board as well as courts (RLEA 15) overlooks this Court's decisions in *Pitney* and *Slocum*. The Court in the *General Committee* case was treating a representation matter, and it specifically stated:

> "That new provision [Section 2, Ninth] gave the National Mediation Board an adjudicatory function in the settlement of representation disputes." (320 U.S. at p. 330)

It seems doubtful that the *General Committee* case would have been cited in *Pitney* if it felt the nonjusticiable rationale was to be extended to the Adjustment Board.

Moreover, the Court subsequently explained its decision in the *General Committee* case as follows:

> "* * * This result was reached because of this Court's view that jurisdictional [representation] disputes between unions were left by Congress to mediation rather than adjudication. 320 U.S. 302 and 337. *That is to say, no personal right of employees, enforcible in the courts, was created in the particular instances under consideration.* 320 U.S. 337. * * *" *Stark v. Wickard*, 321 U. S. 288, 306 (1944).

firmed, 299 N. Y. 496, 87 N. E. 2d 532. On certiorari this Court reversed:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes *of the type here involved* is exclusive." (*Id.* at 244)

Mr. Justice Black, again spoke for the Court pointing out that these disputes furnish a "potent cause of friction leading to strikes" and that the Act thus—

> "* * * represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for *adjustment of railroad-employee disputes growing out of the interpretation of existing agreements.* * * * (*Id.* at 243)

Reference was made to the *Pitney* case:

> "* * * There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute *involving the railroad and two employee accredited bargaining agents* . . .' Our ground for this holding was that the court 'should not have interpreted the contracts' but *should have left this question for determination by the Adjustment Board, a congressionally designated agency* peculiarly competent in this field. 326 US at 567, 568." (*Id.* at 243)

Pitney and *Slocum* were at the heart of the decision of the court of appeals below. TCU challenges this reliance, insisting those two cases did not even "mention" the issues involved here and did not involve the question of Adjustment Board jurisdiction to determine interunion work disputes. In short, TCU argues that those cases are not "determinative" here (Br. 27) reading those cases as only involving the question as to whether a court can

entertain a suit "between *a* carrier and *a* union [Br. 27]." It is suggested (Br. 27-28) that this Court in deciding *Pitney* and *Slocum,* was unaware of the facts in those cases.

It is submitted, however, that this Court was fully aware that by its decision in *Pitney* it determined the jurisdiction of the Adjustment Board to include a controversy between two unions over a work-assignment dispute. Moreover, this was specifically called to the court's attention in the petition for rehearing which was filed by ORC. At page 2 of that petition ORC raised the same point that TCU does here in arguing that the Court in *Pitney:*

> "* * * has accorded the Adjustment Board a more extensive jurisdiction than that granted to it by Congress. Congress limited the jurisdiction of the Adjustment Board to disputes between employees and the carriers, and *did not grant jurisdiction to the Board to hear and decide 'jurisdictional disputes' between two distinct crafts and classes of employees."*

The petition for rehearing was denied.[19] (327 U. S. 814)

---

[19] Many of the arguments now raised by *Amicus* RLEA and TCU concerning the jurisdiction of the Adjustment Board were called to the Court's attention in ORC's petition for rehearing. Thus, at page 3 of that petition, ORC stated:

> "* * * If 'jurisdictional disputes' between two or more crafts were to be submitted to such a board, the labor representatives on the board would be split by their respective individual interests in the controversy and the carrier representatives would be inclined to remain united. The result would be that a group of employees, or their statutory representative, aggrieved by carrier action in these circumstances would be forced to submit the controversy to a division of the Adjustment Board one of whose labor members is hostile to its position, with the decision resting in the hands of the carrier members entirely. The advantages of balanced representation with submission of deadlocked cases to a neutral referee would be destroyed and an instrument of oppression would be placed in carrier hands."

Justice Reed's dissent in *Slocum* was also premised on much the same arguments now argued by TCU and *Amicus* RLEA (339 U. S. 245 *et seq.*).

A mere reading of the *Slocum* decision compels the rejection of TCU's attempted narrow consideration of that case. Moreover, TCU's present position in this case is contrary to the arguments which it made to the Court in *Slocum*—arguments which were adopted by this Court in reaching its decision.

In the *Slocum* case, the railroad in seeking the declaratory construction of the TCU and BRC agreements alleged that it was afforded no such remedy before the Adjustment Board, that it could not bring the claims of TCU and BRC jointly before the Board to obtain a determination binding on both TCU and BRC (par. 30; *Slocum* R. 13). TCU denied this allegation (*Slocum* R. 19), thus admitting the Adjustment Board's jurisdiction to interpret both the BRC and TCU agreements in one Board proceeding.

In its brief in *Slocum,* TCU argued that the Adjustment Board had jurisdiction of the same three-party dispute brought in Court:

> *"The present controversy, is almost a prototype of the kind of case that is heard by the Railroad Adjustment Board every day.* This tribunal is recognized by carriers and labor unions alike as the appropriate forum for the prompt and expert settlement of such controversies." (TCU brief, *Slocum,* p. 29)

And:

> "Even if it be assumed, however, that the carrier was entitled to be relieved of obligation under one or the other contract, this would not justify the ousting of the stautory tribunal, *which clearly has jurisdiction over the entire case and all of the parties."* (TCU brief, *Slocum,* p. 33)

Other courts have since also held that the Adjustment Board has the primary jurisdiction and duty to decide interunion disputes which are involved in a grievance against a railroad. *Brennan v. Delaware, L. & W. R. Co.,* 103 N. E. 2d 532, 303 N. Y. 411 (NY, 1952), cert. den. 343 U. S. 977; *New York Central R. Co. v. Brotherhood of Locomotive Firemen,* 355 F. 2d 503, 505 (CA-7, 1966); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.,* 199 F. 2d 384 (CA-5, 1952).

The theory now advanced by TCU here would reduce Adjustment Board handling of interunion work-assignment disputes to an exercise of futility. Nothing would be resolved—indeed, every time the Adjustment Board decided a work assignment dispute in favor of the claiming union another dispute would be created. *Missouri-Kansas-Texas R. Co. v. N. R. A. B., et al.,* 128 F. Supp. 331 (DC-Ill., 1954); *Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co.,* 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997.

In his dissent in *Carey v. Westinghouse Electric Corp.,* 375 U. S. 261, 275 (1964), Mr. Justice Black pointed out that in both the Labor Management Relations Act and the Railway Labor Act, Congress hoped to "abate" jurisdictional disputes "between unions over which union members would do certain work," citing *Radio & Television Broadcast Engineers Union* and *Pitney.* (Id. at 275, n. 2)[20] It is submitted that adoption

---

[20] Justice Black also noted that in these situations the employer "has done nothing wrong" and to subject him to damages was contrary "to the basic principles of common everyday justice." (375 U. S. 261, 275)

of TCU's position would simply fan the jurisdictional fires which Congress intended to put out.

The court below correctly decided that the Act did not intend that these jurisdictional disputes be decided in a "piecemeal manner." (R. 94) In *Labor Board v. Radio & Television Broadcast Engineers Union,* 364 U. S. 573 (1961), this Court clearly recognized that to decide a work-assignment dispute such as this meant a resolution of the whole dispute, including which union should perform the work.

Congress' use of the words "make an award" in Section 3, First (1) of the Railway Labor Act, indicates a clear intention that the disputes or controversies in their entirety were to be resolved. There is no basis for suggesting that Congress intended the Adjustment Board should decide these disputes on a piecemeal basis. To do so would be contrary to the basic and underlying general purposes of the Act and the general duties imposed.

B. There is no conflict between the Court of Appeals' decision and this Court's decision in Whitehouse and Carey.

TCU's challenge of the court of appeals' decision is essentially based upon the decisions of this Court in *Whitehouse v. Illinois Central R. Co.,* 349 U. S. 366 (1955) and *Carey v. Westinghouse Electric Corp.,* 375 U. S. 261 (1964). It contends that *Whitehouse* conflicts with the court of appeals' holding that having been given notice under Section 3, First (j), "[the] Clerks for all practical purposes thereby become parties to the administrative proceeding [R. 96]" and that *Whitehouse* shows

that the Adjustment Board does not have jurisdiction to determine the rights and agreement scope of employes other than those filing the original claim (Br. 31). TCU even argues that *Whitehouse* "stated very plainly" that a carrier could be liable to two unions for the same work (Br. 36). The *Whitehouse dicta* is also relied upon by *Amicus* RLEA. (RLEA 14)

The Court in *Whitehouse* did refer to a number of issues which are also involved in this case, but it carefully refrained from deciding those questions and properly predicated its decision entirely upon the sole basis of prematurity. *Whitehouse* involved an attempt by a railroad to enjoin further Adjustment Board action for failure to give the Section 3, First (j) notice to other parties involved. The Court simply held that judicial relief should be denied "at this stage of the administrative process" because the railroad's "resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it [*Id.* at 373]." That the court's decision in *Whitehouse* represented only a "hands-off policy" was subsequently reaffirmed in *Carey v. Westinghouse Corp.*, 375 U. S. 261, 267.

The statement in *Whitehouse,* to which TCU and RLEA refers, to the effect that even if notice were given to the Clerks they could be "indifferent to it" and could "refuse to participate [Br. 31; RLEA 14]," in the context of that decision was simply a recognition that the Clerks could not be forced to participate and did not mean nor imply that their presence in the dispute should be ignored or that a decision would not still be binding upon them.

Similarly, the Court's observation in *Whitehouse* that there was no "legal right of the complaining party to be free from such injuries," did not, as TCU contends (Br. 36), constitute a holding that the railroad could be liable to both unions for the same work. In fact, the Court was not there even referring to the possibility of double liability but rather to the possibility of double vexation and specifically to the railroad's claim that it would suffer irreparable injury because it "would be required to devote time and money to what it deemed an invalid proceeding [*Id.* at 370]." This is confirmed in the final paragraph of the decision where the Court observed that:

> "* * * among the injuries asserted by Railroad, only the possibility that it is being put to needless expense incident to the pending Board proceeding will necessarily be involved if judical relief is denied at this stage of the administrative process * * *." (*Id.* at 373)

On the other hand, the Court in *Carey,* which it indicated was "analagous" to *Whitehouse,* recognized the fundamental principle that an employer could not both be obligated to provide one union with the work and liable for damages to another union for not being given the same work.

The Court in *Carey* followed the lead of *Whitehouse* by adopting a "hands-off policy" permitting arbitration of a work-assignment dispute to continue without the presence of the union representing the employes performing the disputed work. This was done on the theory that the employer's objections were merely premature in that "the arbitration may as a practical matter end the controversy [*Id.* at 265]." As in *Whitehouse,* it was felt that

resort to the court had "preceded any award, and one may be rendered which could occasion no possible injury to it [*Id.* at 266]." At the same time, however, the Court also recognized that "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute [*Id.* at 265]," and that the dispute might still end up before the NLRB[21] whose decision "would, of course, take precedence [*Id.* at 272]." The court then significantly pointed out that if the employer's assignment of work were in accordance with the NLRB decision, "it would not be liable for damages under § 301 [*Id.* at 272]."

In other words, if an NLRB decision in the *Carey* case should ultimately decide that the union performing the work was entitled to it, the employer would not be liable to the claimant union for damages for breach of its collective bargaining contract under Section 301 of the NLRA. Clearly, this negates TCU's contention that an employer might be obligated to give the work to one union and liable to another union for damages under its contracts.

TCU also argues that because both *Whitehouse* (Br. 31) and *Carey* (Br. 34) held that the proceedings could proceed without the presence of the other union, that it was not necessary to consider the scope or rights of the employes covered by the other union's agreement, and that "it may be assumed" that the award "would be valid and subject to enforcement [Br. 33]." Such a conclusion is not warranted.

---

[21] The decision of the arbitrator in *Carey* did not end the dispute and, after a rather tortuous route, ultimately ended up before the NLRB where it is presently pending. (NLRB cases Nos. 5-RM-422, 5-RM-500, 5-RC-1670, 5-UC-3)

Both of those decisions were based upon prematurity which, as the Court indicated in *Carey,* is simply an adoption of a "hands-off policy." In both cases this policy was specifically justified by the fact that an award *might* be rendered "which could occasion no possible injury" to the employer, e. g., a denial award. Those decisions imply no prejudgment whatsoever as to the ultimate validity of a sustaining award which might injure both the employer and the absent union. Certainly, there is no basis for believing that the mere ordering of arbitration in both cases furnishes any basis that the award "may be assumed to be valid and subject to enforcement." (Br. 33)

On the contrary, both decisions indicated a recognition of the fact that the ultimate validity of a sustaining award might have to be determined in some subsequent proceeding. In *Whitehouse,* the Court (at 349 U. S. 372) noted that alleged defects in the award might have to be tested in an enforcement action and cited *Federal Trade Commission v. Claire Furnace Co.,* 274 U. S. 160, 174 (1927). In the latter case, the Court premised its denial of an injunction against an order of the Federal Trade Commission on the grounds that the objections urged would be more appropriately considered in an enforcement action where the objectors would "have full opportunity to contest the legality of any prejudicial proceeding against them." In *Carey,* as noted above, the Court specifically pointed out that the arbitration proceeding "might not put an end to the dispute" and that it might still have to be finally resolved in an NLRB proceeding

whose decision "would, of course, take precedence" over the award.[22]

C. The Adjustment Board has jurisdiction and whatever authority is necessary to resolve work-assignment disputes.

Both TCU and RLEA argue that the Adjustment Board does not have authority to resolve interunion work-assignment disputes, because its authority is limited to the interpretation of agreements (Br. 9, 17; RLEA 6-9) and resolution of possible conflicts in such agreements would invade the jurisdiction of the National Mediation Board under Section 2, Ninth (Br. 35; RLEA 11).

But the resolution of these work-assignment disputes is accomplished simply by an *interpretation* of generally phrased agreements and does not involve rewriting, modifying or amending such agreements. Any potential conflicts in such agreements arise from a resolution of highly ambiguous contract provisions rather than from any irreconcilable conflict based on unambiguous provisions. In this case, TCU's claim was not predicated upon any provision of its agreement specifically granting the involved work to telegraph employes, but upon a broad in-

---

[22] *International Brotherhood of Firemen and Oilers v. International Assn. of Machinists*, 338 F. 2d 176 (CA-5, 1964), does not support TCU's contention that once the Adjustment Board's jurisdiction over the dispute is established, its award is thereby entitled to be enforced (Br. 34). That case involved the enforcement of an arbitration of a jurisdictional dispute between two unions pursuant to a "no-raid agreement" and the defense was essentially predicated upon a challenge to the authority of the arbitrator. Under those circumstances, the Court held that since *Carey* had held that agreements to arbitrate such disputes should be enforced, the Court's jurisdiction to enforce such an award "follows as a matter of course." That decision, disposing of a challenge to an arbitrator's jurisdiction to resolve a jurisdictional dispute between two unions, did not consider the effect that an improper procedure and failure to resolve a work-assignment dispute might have upon the enforceability of an award.

terpretation of the highly indefinite and ambiguous provisions of its scope rule (R. 14), and as the Adjustment Board noted in its award—

> "* * * where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement." (R. 48)

There is no reason to believe that the Adjustment Board could not have resolved this interunion dispute simply by a joint interpretation of one agreement with the other and the custom, practice and usage thereunder.

Because of the inherent ambiguity in collective bargaining agreements most work assignment disputes probably could be resolved by an interpretation of the two agreements and an accommodation of one with the other. The jurisdiction of the Adjustment Board, however, is not limited to a resolution of only those disputes which concern the interpretation of agreements, but also extends to disputes "growing out of the * * * *application* of agreements," and, in particular, also extends to the far more general coverage of "disputes * * * growing out of *grievances* [Section 3, First (i)]."

This Court in *Elgin, J. & E. Ry. Co. v. Burley*, 327 U. S. 661, 664-665 (1946), the so-called *"Second Burley Case,"* noted that:

> "* * * Its [the Adjustment Board's] expertise is adapted not only to interpreting a collective bargaining agreement, but *also to ascertaining the scope of the collective agent's authority* beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage."

The Board's jurisdiction has been held to include a grievance of an employe who was not even covered by a collective bargaining agreement. *Thomas v. New York, Chicago & St. Louis R. Co.,* 185 F. 2d 614, 616 (CA-6, 1950). Indeed, in *New York Central R. Co. v. Brotherhood of Locomotive Firemen,* 355 F. 2d 503, 505 (CA-7, 1966), it was specifically held that the resolution of a work assignment dispute involving a conflict between the engineers' and firemen's agreements was within the jurisdiction of the Adjustment Board.

Where a dispute grows out of "grievances" or out of the "application of agreements," the Adjustment Board has jurisdiction under the Act, and in the exercise of this jurisdiction it is obligated and empowered under Section 3, First (k) and (l) to make a "final award" as to "any such dispute." This statutory responsibility carries with it the duty to establish such procedure and exercise such authority as is necessary to meet that obligation. Despite the fact that the statute does not set out in detail what standards should be followed or what authority the Board should exercise in arriving at its "final awards," as was also the case in *N. L. R. B. v. Radio Engineers,* 364 U. S. 573 (1961), there is sound basis to "feel entirely confident that the Board, with its many years of experience" will be able to "devise means of discharging its duties" under the Act "in a manner entirely harmonious" with its other provisions. (364 U. S. at 584)

Neither *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711 (1945), nor *Southern Pac. Co. v. Joint Council*

Dining Car Employees, 165 F. 2d 26 (CA-9, 1948), supports the contention that the Adjustment Board's jurisdiction is limited to the interpretation of contracts (RLEA 8-9). The portion of the *Elgin* case (the so-called *"First Burley Case"*) quoted by RLEA was concerned only with making a general distinction between "major" disputes, which "look to the acquisition of rights for the future," and "minor" disputes where "the claim is to rights accrued." That the Court in the *First Burley Case* did not intend to limit the authority of the Adjustment Board to the mere interpretation of contracts is confirmed by its specific statement in the *Second Burley Case, supra,* that the Board's authority was *not* limited "only to collective bargaining agreements," but also extended to "ascertaining the scope of the collective bargaining agent's authority" (327 U. S. at 664-665). Similarly, the *Southern Pacific Co.* case did not hold that the Board was limited to the interpretation of agreements (RLEA 8-9). While the court noted that the Board in the award before it had so ruled (*Id.* at p. 28), it did not accept that limitation and chose to accept instead the broader interpretation of the Board's powers in a later award and cited the above statement of this Court in the *Second Burley Case.*

Steele v. Louisville & N. R. Co., 323 U. S. 192 (1944), and *B. of R. T. v. Howard,* 343 U. S. 768 (1952), cited as indicating the Adjustment Board's inability to resolve questions of validity of agreements (RLEA 8-9), do not suggest that the Adjustment Board would not have jurisdiction to consider and resolve these work-assignment disputes by interpreting and applying the collective agreements. Those two cases simply held that the courts

had jurisdiction to consider charges by an employe that its collective bargaining representative had violated its obligation under the Railway Labor Act by reason of racial discrimination. In the *Steele* case this Court observed that the Adjustment Board "could not give the entire relief" sought in the court action because Section 3, First (i) "makes no reference to disputes between employees and their representatives [*Id.* at 205]." Similarly, the *Howard* case affirmed a right of judicial remedy in that the Adjustment Board could not afford an "adequate administrative remedy" for a violation of the Act which had thereby invalidated the contract (*Id.* at 774).

Moreover, in both *Steele* and *Howard* the Court found that the Adjustment Board's jurisdiction was not exclusive in the sense that it precluded court action. It was not suggested that it would be improper or clearly outside the scope of its jurisdiction if, on the basis of these decisions, the Adjustment Board were to rule invalid and refuse to enforce provisions of an agreement which constituted an unlawful racial discrimination. Indeed, it would be normal to expect the Adjustment Board to do so.

Neither *Switchmen's Union of N. A. v. Nat. Mediation Board,* 320 U. S. 297 (1943), nor *B. L. E. v. Missouri-K-T R. Co.,* 320 U. S. 323 (1943), indicate that the exercise of jurisdiction by the Adjustment Board over work-assignment disputes would constitute an improper invasion of the jurisdiction of the National Mediation Board (RLEA 11). The *SUNA* case simply held that the determination of representatives by the National Mediation Board under Section 2, Ninth, of the Act, was

not reviewable in the courts. The *M-K-T* case, in turn, held that the Mediation Board had jurisdiction under Section 2, Ninth, to resolve jurisdictional disputes "between unions or groups of employees" and that the courts did not have such jurisdiction. Neither case considered the jurisdiction of the Adjustment Board to resolve a work-assignment dispute between two unions which did not arise under Section 2, Ninth, but arose out of a grievance between one union and the carrier and which had been submitted to the Adjustment Board in accordance with Section 3, First (i) of the Act.

It is of course clear that a representation dispute between two unions might be submitted to the National Mediation Board under Section 2, Ninth, and that the Board would then have jurisdiction to resolve that dispute. Where, however, the dispute is framed as a grievance between one union and the carrier, the Adjustment Board properly has jurisdiction under the Act to resolve the entire dispute and make a final award. If this could be said to be an exercise of authority similar to that also assigned to the Mediation Board, then it is nevertheless an overlapping of substantive functions for different forms of proceedings which must have been contemplated.

Div. No. 14, *Order of Railroad Tel. v. Leighty,* 298 F. 2d 17 (CA-4, 1962), cert. den. 369 U. S. 885, was also cited by RLEA as authority for the proposition that the Adjustment Board is without jurisdiction in a work-assignment dispute. (RLEA 11) Plainly, that case does not support such a contention—indeed it supports the contrary. With respect to the statement in the *M-K-T* (or

so-called *"General Committee"*) case concerning the jurisdiction of the Mediation Board over jurisdictional disputes, the Court of Appeals for the Fourth Circuit specifically noted that:

> *"Decisions of the Supreme Court subsequent to the General Committee cases establish that the National Railroad Adjustment Board is the forum in which jurisdictional disputes should be litigated if they depend for resolution upon an interpretation of existing bargaining agreements.* See Order of Ry. Conductors of America v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946); Slocum v. Delaware, L. & W. R., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950)." (298 F. 2d at 20, Note 5)

The court also recognized that the reference in *Howard* to the jurisdiction of the courts to determine the "validity" of a collective bargaining agreement "dealt with an agreement directly violative of the Act" and—

> "* * * the conclusion is inescapable that district courts have no such authority where 'validity' of the contract depends upon the merits of a representation dispute." (*Id.* at 20)

In *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 597 (1960), this Court recognized that—

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

D. The exercise of Adjustment Board Jurisdiction cannot be controlled by the way TCU framed the issues.

Both TCU and RLEA assume that the scope and issues of a work-assignment dispute before the Adjustment Board and the exercise of the Board's jurisdiction can be controlled simply by the careful framing of the claim presented to the Board. Thus, in this case the "Statement of Claim" (R. 5) was framed so as to make it appear that all that was involved was an alleged violation of the Telegraphers' Agreement and that money damages only were sought. The device was rejected at the district court where Judge Chilson was of the opinion that Award 9988 would involve more than a mere violation of the Telegraphers' Agreement and money damages. He cited and quoted from *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 188 F. 2d 302 (CA-7, 1951), (R. 81-82):

> "* * * We can think of no employee having a more vital interest in a dispute than one *whose job is sought* by another employee or group of employees." (*Id.* at 306)

The court below also properly rejected this "horse blinders" concept, recognizing that the issues of the dispute, however framed, must be derived from a consideration of all of the facts.[23]

Before this Court TCU continues its use of this device insisting that the claim which it filed with the Ad-

---

[23] The Court of Appeals for the Third Circuit said such a contention had an "attractive simplicity" but nevertheless rejected it as being "an unacceptable means of avoiding a jurisdictional dispute." *National Labor Relations Board v. Local* 1291, *International Longshoremen's Association,* 345 F. 2d 4, 8, 10 (CA-3, 1965), cert. den. October 25, 1965.

justment Board sought only "monetary compensation and not an assignment of the work [Br. 11-16]."

We believe this to be factually incorrect[24] but even if TCU was only seeking money damages, the ultimate objective and effect of its claim, if sustained by the Adjustment Board and enforced by the court, would result in ousting the clerical employes from the work on the IBM machines at Las Vegas.

In Award 9988, TCU made two distinct claims. In paragraph (b) of the claim, it sought a determination

---

[24] The Report of the Vice Presidents of the Order of Railroad Telegraphers (now TCU) to the Thirty-Sixth Regular and Third Quadrennial Session of the Grand Division, Miami Beach, Florida, June, 1964, contains reports of the efforts of two TCU Vice Presidents to obtain compliance by Union Pacific with Award 9988. Vice President A. O. Olson, at page 307, described a meeting held on January 4, 1962:

> "The damage to our people in 8656 was also reviewed, which was caused by the facts that a prior agreement had been made that claims similar to 8656 involving a number of other points had been tied to the outcome in 8656 and had thereby adversely affected a number of offices not directly involved in the Salt Lake City claim (8656). Under these circumstances, *we indicated that if in the application of* 9988 *the Carrier would remedy the damage caused in* 8656 *we would be reasonable in the matter of money reparations since our main concern was to preserve for our people the work that rightfully belonged to them.*" (Note: The reference to "8656" is the prior award of the Adjustment Board in this matter, *supra*, p. 8.)

TCU Vice President R. J. Woodman tells of a meeting on December 3, 1963 (which was *after* TCU had filed this enforcement action):

> "After considerable discussion on all angles of the Award, Attorney Wilcox asked if we had any suggestions that Management could consider in reaching a settlement in the instant case. *We told him that the employees were very disturbed over the loss of jobs in the telegraphers' ranks* and that we must have some form of job stabilization on this property. We emphasized that carrier must give consideration to job stability and the protection of the rights of telegraphers to perform all work that has been traditionally and historically performed by telegraphers on this property. *We further demanded that management agree to conduct a joint check on the property to be made by General Chairman Herrera and a responsible representative of the carrier at all communication points on the property to determine the proper work as between clerks and telegraphers. We stressed the fact that only by a joint check at all locations could a proper understanding be reached as to the work involved, and who should perform the work.*" (p. 131)

that Union Pacific was violating the Telegraphers' Agreement "when it requires or permits other than those covered by said agreement" to perform the particular work functions involved, and in paragraph (c) it asked money damages "for each 8-hour shift, both day and night, since August 25, 1952 [R. 5]." The record shows that TCU did in fact ask that the work "be properly assigned to telegraph service employes [R. 7]." The Adjustment Board sustained both claims (b) and (c) "as stated in the Opinion [R. 51]." Moreover, in the Adjustment Board's opinion it was stated that—

> "* * * Tape-producing machines activated by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher.
>
> "The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office." (R. 50)

Thus, in sustaining claim (b), the Board ruled that this work may not be performed by Clerks but must be performed by a telegrapher and, in sustaining (c), that the Carrier should pay continuing damages for each day that the alleged violation continues, i. e., until the violation be corrected by assignment of the work to a telegrapher (R. 51).

The order of the Adjustment Board required Union Pacific:

> "* * * to *make effective* Award No. 9988 made by the Third Division of the National Railroad Adjust-

ment Board * * *; *and* if the Award includes a requirement for the payment of money, *to pay to the employe* (or employes) *the sum to which he is* (or they are) *entitled under the Award* * * *." (R. 71)

In its complaint TCU requested the district court to—

"* * * make such order and enter such judgment, *by writ of mandamus or otherwise,* as may be appropriate to enforce the Award and Order referred to in Exhibit 1 hereof, *and* requiring the defendant to make an accounting to the plaintiff of all monies due under the aforesaid Award and Order * * *." (R. 4)

A writ of mandamus is an inappropriate remedy to enforce a claim for money damages and could only have had reference to enforcement of the other portion of the Award relating to the determination that a telegrapher instead of a clerk must be used to perform the work.

In *Hunter v. Atchison, T. & S. F. Ry. Co.,* 171 F. 2d 594, 597 (CA-7, 1948), the court said:

"It is also true, as argued by the brakemen, that the Award under attack does not directly take the work from the porters and give it to the brakemen, *But the effect is precisely the same as though the Award had done so in express terms.* * * *"

Similarly, in *Allain v. Tummon,* 212 F. 2d 32 (CA-7, 1954), while the claim sought money damages only, the court still said that:

"* * * in presenting its claim to the Board the Brotherhood was *in effect asking that the plaintiffs be replaced by dining car stewards* * * *." (p. 36)

Recently, the U. S. District Court for the Eastern District of Wisconsin, in *Brotherhood of Railroad Train-*

men v. Chicago, Milwaukee, St. Paul and Pacific R. Co., dated August 17, 1966, and reported unofficially at 62 L. R. R. M. 2828, enforced an award of the First Division where the railroad had paid the money damage claims but had declined to assign the work to the successful claimants. The award involved was First Division Award No. 20038 (149 N. R. A. B. (1st Div.) 322). The claim did not seek an assignment of work—only monetary penalties.

It was held that—

> "Implementation of the award as required by the order of the Board *necessarily calls for assignment of the bleeding job to employees represented by plaintiff* in addition to the payment of monetary claims."

TCU's highly unrealistic position that it was just seeking money damages rather than assignment of the work must be summarily rejected. Faced with the monetary penalty of paying telegraph employes for not performing the work and also the clerical employes for performing it, it is clear that Union Pacific would inevitably be compelled to transfer such work from clerks to telegraphers. Certainly the liability for a double monetary penalty for not assigning the work to employes represented by TCU would be just as effective in coercing the taking of that work from the clerks as a direct order of the court or the Adjustment Board.

A choice of duplication of job assignments or "feather-bedding" payments by an employer is not considered an acceptable means of avoiding or settling a jurisdictional dispute and justifies the conclusion that the union's real purpose is to compel the employer to assign the par-

ticular work to its own members rather than the members of another union. *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 335 F. 2d 216, 221-222 (CA-9, 1964), cert. den. 379 U. S. 999 (1965); *National Labor Relations Board v. Local 1291, International Longshoremen's Assn.*, 345 F. 2d 4, 9-10 (CA-3, 1965), cert. den. 382 U. S. 891 (1965).

E. "Overlapping contracts" assigning the same work to different groups of employes are not possible under national labor policy.

Implicit in the position of both TCU and RLEA is the erroneous assumption that in these work-assignment disputes the railroad has bound itself by "overlapping contracts" to both TCU and BRC. (Br. 12; RLEA 14) It is argued that both unions could have a contractual right to the same work and thus each union's claim of work right should be decided solely in the context of that union's contract. The court of appeals below rejected such an argument and correctly recognized that this was not a case of "overlapping" or inconsistent contracts, that only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute (R. 94). While inconsistent contracts are possible at common law, this is not the situation under the national labor policy. See *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456-457 (1957), and *Labor Board v. Radio & Television Broadcast Engineers Union*, 364 U. S. 573 (1961).

We submit that neither of Union Pacific's contracts with TCU or BRC can be viewed as ordinary contracts

governed by common law concepts. Collective labor agreements are not ordinary contracts and to apply commercial contract law to these would lead to absurd results. Thus, in *John Wiley & Sons v. Livingston,* 376 U. S. 543, 550 (1964), Mr. Justice Harlan speaking for a unanimous court stated:

> "* * * While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. '. . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.' *Warrior & Gulf, supra,* at 578-579 (footnotes omitted). Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, see *id.,* at 580, and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, *supra,* pp. 546-547, must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy."

While the court was dealing with the question of a suc-

cessor corporation and the collective bargaining agreement of the predecessor, the rationale in *Wiley* is controlling here.

Amicus RLEA has itself recognized that the "strict principles of commercial contract law and the common law of master and servant" are not appropriate guidelines in this area. Brief for RLEA as *Amicus Curiae*, p. 12, *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965).

Railroads no longer have the right to treat with or contract with respect to a given subject matter with whomever they might otherwise choose. Under Section 2, Ninth, once a collective bargaining representative is selected to represent employes performing a given classification of work, the railroad is obligated to treat only with that representative for all purposes of collective bargaining.

As RLEA recognizes (RLEA Br. 16), this section "imposes the affirmative duty to treat only with the true representative, and *hence the negative duty to treat with no other.*" *Virginian Ry. Co. v. System Federation No.* 40, 300 U. S. 515, 548 (1937); *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al.*, 281 U. S. 548 (1930).

The extent to which any union can bargain for the right to perform work is limited by the scope of its capacity as representative. Thus, a union has no right to demand and insist that an employer expand the bargaining

unit to include additional work, *N. L. R. B. v. Local* 19, *International Bro. of Longshoremen,* 286 F. 2d 661 (CA-7, 1961), cert. den. 368 U. S. 820; *U. S. Pipe and Foundry v. N. L. R. B.,* 298 F. 2d 873 (CA-5, 1962), cert. den. 370 U. S. 919. Under both labor acts, conflicting individual contracts with employes who are represented collectively are not enforceable. *J. I. Case Co. v. Labor Board,* 321 U. S. 332 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U. S. 342 (1944).

An employer can properly negotiate and enter into an agreement covering the right to perform certain work only with the true representative of the group whose craft line encompasses that particular work. Where one craft representative has successfully secured recognition and contractual rights to a given class of work, no agreement with a different representative or group of employes covering that same work would be valid. This restriction on the common law concept of freedom of contract, which is so vital to the national labor policy, does not impinge upon constitutional guarantees. *Virginian Ry. Co. v. System Federation No.* 40, 300 U. S. 515, 558-559 (1937).

In *General Committee, B. L. E. v. M-K-T R. Co.,* 320 U. S. 323 (1943), BLE argued that it had the exclusive right to bargain with M-K-T with respect to work falling within that craft, engineers' work, and that an agreement with BLF&E concerning use of firemen as engineers was void. BLE's argument was summarized by the court as follows:

> "* * * Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive

> also suggests that Congress intended to write into the Railway Labor Act a restriction on the rules and working condition concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of § 2, Ninth. * * *" (*Id.* at 335)

This Court ultimately held that the resolution as to which union had the right to contract for this work was not justiciable by a court, but did not impair its prior recognition that under the Railway Labor Act only one of those two competing unions had the right to contract for any particular work.

Moreover, it must be remembered that we are not here dealing with specific contractual grants of work as such. The scope rules of railroad contracts, and TCU's here, do not list any specifiic work items but simply list positions. The Adjustment Board must of necessity interpret the agreement against the background of custom, usage and practice in the industry. Any alleged exclusive grant of work is necessarily based on the construction, interpretation and application placed upon these general provisions by the Board. Since a direct unambiguous assignment of the same work to two unions is inconsistent with the national labor policy, such a double assignment cannot be derived from the interpretation of the type of ambiguous contract involved here.

Under the Railway Labor Act, therefore, a railroad cannot enter into duplicating or "overlapping contracts" with respect to the same work. It can only properly and validly contract with the representative which is entitled to represent employes performing that particular type of work and no other. The suggestion that an employer might be equally bound under its contracts with both the competing unions has been and must be rejected as contrary to the national labor policy. *Labor Board v. Radio & Television Broadcast Engineers Union,* 364 U. S. 573 (1961); *International Bro. of Carpenters v. C. J. Montag & Sons,* 335 F. 2d 216 (CA-9, 1964), cert. den. 379 U. S. 99.

F. Neither the divisional arrangement nor the bipartisan structure of the Adjustment Board impairs the exercise of jurisdiction over both parties to an interunion work-assignment dispute.

The establishment of the Adjustment Board with four independent divisions is urged by TCU and RLEA (Br. 19-20; RLEA 12-13) as indicating that Congress did not intend that it have jurisdiction over "jurisdictional disputes." The basic contention is that since each division has exclusive jurisdiction over disputes involving the type of employes assigned to it, in the event a dispute arose between employes whose work was assigned to different divisions there allegedly would be no way that such a dispute could be resolved. This problem is not presented here.

Under the Act, divisional jurisdiction is not predicated upon either the craft of the employes claiming the

work nor on what those employes claim is the nature of the disputed work, but rather upon the real nature of the work which is involved in the dispute. This Court has said that divisional jurisdiction of the Adjustment Board under the Railway Labor Act is grounded—

> "* * * on a craft or job classification irrespective of the labor organization representing the particular employees involved." *Order of Railway Conductors v. Swan,* 329 U. S. 520, 528 (1947).

Therefore, the hypothetical situation suggested by TCU (Br. 19-20) with respect to employes represented by the Brotherhood of Railroad Signalmen (whose duties normally fall within the Third Division) claiming work assigned to employes represented by the International Brotherhood of Electrical Workers (whose duties normally fall within the jurisdiction of the Second Division), would not present any unresolvable dilemma. The Third Division would not have "exclusive jurisdiction" over the dispute simply because the work was claimed by the Signalmen's union any more than the Second Division would have jurisdiction because it was performed by employes who were members of the Electrical Workers' union. Divisional jurisdiction would depend upon the nature of the disputed work, itself, and not the affiliation of either of the claimants.

In any event, whichever division was ultimately determined to have jurisdiction over the disputed work, it would still not preclude that division from considering and protecting the interests of all parties, including a union which might normally represent employes performing work subject to a different division. There is no divi-

sional limitation in Section 3, First (j) with respect to the giving of notice to all parties "involved" in a dispute, and there would be no purpose nor reason for such notice unless such parties were entitled to have their interests considered and protected without regard to the fact that they might normally represent employes whose duties fell within the jurisdiction of a different division.

The courts have had little difficulty in resolving any such problems. Thus, in *Brotherhood of R. R. Trainmen v. Templeton,* 181 F. 2d 527 (1950), one of the cases referred to by TCU as an example (Br. 20), express messengers who were represented by the BRC (and whose duties normally fell within the scope of Third Division jurisdiction) successfully voided certain awards of the First Division holding that some of their duties exclusively belonged to baggagemen represented by BRT (which work was within the scope of First Division jurisdiction) because notice had not been given to the express messengers or BRC under Section 3, First (j). In a subsequent action by BRT to require the First Division to reopen and again consider its claims in those voided awards, the court in *Brotherhood of R. R. Trainmen v. Swan,* 214 F. 2d 56 (CA-7, 1954), ordered that the First Division should reopen these cases, but specified that proper notice be given to the express messengers and that in the Board proceedings the express messengers would be entitled to full participation and that they "may defend on the merits as though they were original parties [p. 59]." The court further indicated that in this proceeding, despite the fact that disputes involving these contending unions normally came within the scope of differ-

ent divisions, the First Division nevertheless had a "duty to determine the rights of the contending parties [p. 59]"[25]

TCU also contends that the fact that the Adjustment Board was established as a bipartisan organization under Section 3, First (a) would in effect permit the carriers to decide which craft should perform the work because allegedly the representative on the Board of that selected craft would vote with the carriers and against the claiming union (Br. 20-21; RLEA 16). If any such possibility exists, however, it is not because of the requirements of the statute but rather is a result of the unions' choice of a method of selecting and designating the responsibility of the labor members on the Adjustment Board.

The Railway Labor Act contains no suggestion that Congress intended that the labor representatives on the Adjustment Board should act solely in the interests of one individual union without regard to the merits of the controversy or, at least, the collective interests of the labor unions involved. Section 3, First (a) simply provides

---

[25] *Seaboard Air Line R. Co. v. Castle*, 170 F. Supp. 327 (DC-Ill., 1958) and *Union Railroad Co. v. National Railroad Adjustment Board*, 170 F Supp. 281 (DC-Ill., 1958) were cited by RLEA to show that some question has arisen in the lower courts as to the scope of divisional jurisdiction of the Board (RLEA 12). Neither case, however, purports to hold that the divisional separation of the Board would preclude one division from considering the interests and agreement of employes subject to another. On the contrary, the court in the *Seaboard* case expressly held that the divisional arrangement of the Board would not impair consideration of the interests of other employes under another division, stating:

> "The court is of the opinion the statutory language used to define the jurisdiction of the divisions by crafts or classes or employees cannot be held by implication to exclude other crafts or classes where a dispute of their own craft or class will necessarily affect another class or craft whose rights would be considered." (*Id.*, at 330).

that labor members of the Adjustment Board would be selected—

> "* * * by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this act."

Section 3, First (c), then confers upon such "national labor organizations," as a body, the right and duty to—

> "* * * prescribe the rules under which the labor members of the Adjustment Board shall be selected, and shall select such members and designate the division on which each member shall serve * * *."

Under such circumstances, where labor representatives are called upon to represent various groups of employes whose interests may at times be divergent or conflicting, such representatives are under an obligation to represent all such groups of employes fairly and impartially. While they are necessarily entitled to exercise discretion in determining what is best for the group as a whole, the exercise of such discretion is subject always to complete good faith and honesty of purpose. *Humphrey v. Moore,* 375 U. S. 335 (1964). It would be a violation of the duty of fair representation for such a representative to intentionally prefer or discriminate in favor of one particular group of employes. *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768 (1952); *Steele v. Louisville & N. R. Co.,* 323 U. S. 192 (1944).

If, in exercising its privileges of self organization under Paragraphs (a) and (c) of Section 3, First, the national railroad labor organizations have established procedures for selection of labor members of the Ad-

justment Board and rules governing their conduct which would permit or encourage such a labor member to exercise his authority solely as the representative and in the self-interest of a particular union, this is a result, not of the statute, but of their own making and is subject to correction by them if that be necessary or desirable from their standpoint.[26]

That the national railroad labor organizations are fully capable of making changes in their methods of selection and control of labor members of the Adjustment Board is amply demonstrated by their ability through policy agreements to hold the labor members of the Board to block voting and unified action, even in cases where it might not be in the interest of some individual union. See Findings of Fact No. 64, 156-158, in the *M-K-T* case which are attached as Appendix B, *infra,* p. 18a.

They were also able to jointly agree on the alteration of that policy whereby labor members would vote to give the statutory notice required by Section 3, First (j), but each organization receiving such notice would decline to participate by the agreed standardized letter. (See Appendix C, *infra,* p. 21a) There is no reason to believe that the labor unions would not be capable of effecting similar changes if necessary to prevent the type of situation which both TCU and RLEA purport to fear.

This would also be the case as to TCU's rather hysterical and highly hypothetical example (Br. 21) that a railroad could avoid its "bargaining obligations" under

---

[26] This is what happened on the Third Division when a labor member voted with the carrier members. See Findings of Fact Nos. 60-62, *M-K-T R. Co. v. N. R. A. B.*, 128 F. Supp. 331, 343.

Section 6 by agreeing to assign the work to both demanding groups and await resolution in its favor by the Adjustment Board. Of course, such an action, if it ever did occur, which we doubt, would be a most flagrant violation of the railroad's duties under Section 2 of the Railway Labor Act. But, more important to our consideration is that TCU overlooks the fundamental fact that the railroad could not lawfully bargain with *two* unions over the assignment of the same work. *Virginian Railway v. System Federation No.* 40, 300 U. S. 515 (1937). And, moreover, one of the two Section 6 demands for the assignment of the work would be clearly outside of Section 6. *Southern Pacific Company v. Switchmen's Union of North America,* 356 F. 2d 332 (CA-9, 1965) affd. on reh. 356 F. 2d 336; *Order of Railway Conductors & Brakemen v. Switchmen's Union of North America,* 269 F. 2d 726 (CA-5, 1959), cert. den. 361 U. S. 899.

G. Nothing in the Railway Labor Act, the structure of the Adjustment Board nor Section 10(k) of the National Labor Relations Act negates the jurisdiction of the Adjustment Board over work-assignment disputes.

1. Section 3, first (i) and (j) contemplate that the Adjustment Board would have jurisdiction to consider and resolve inter-union work-assignment disputes.

TCU contends that under Section 3, First (i), the jurisdiction of the Adjustment Board is limited to deciding the dispute which it filed between itself and Union Pacific and that the Board's jurisdiction did not extend to a consideration of the rights of the Clerks which were not the subject of any dispute with Union Pacific and

which had not been handled nor filed as a dispute with the Board (Br. 16-18). TCU confuses the question of what disputes may be filed with the Adjustment Board with what the Board may properly include in its consideration and decision of such dispute.

Section 3, First (i), specifies the types of disputes which may be filed with the Adjustment Board and requires as a condition precedent to the *invocation* of the Board's jurisdiction that the dispute—

> ¶ be one "between an employee or group of employees and a carrier or carriers";
>
> ¶ be one "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions"; and
>
> ¶ has been previously "handled in the usual manner" with the Carrier.

The immediately following paragraph (j) of Section 3, First, then specifies that the Board—

> "* * * shall give due notice of all hearings to the * * * employees * * * involved in any disputes submitted to them."

Paragraphs (k) and (l) then require that—

> "* * * final awards as to any such dispute must be made * * *"

either by the appropriate division as originally constituted or, if necessary, with the addition of a neutral referee.

We do not suggest, as TCU infers, the Adjustment Board would, in the first instance, have jurisdiction to

consider a work assignment dispute which was framed as being *entirely* between two unions. In that form, such a dispute would probably be within the jurisdiction of the Mediation Board under Section 2, Ninth. *General Committee, B. L. E. v. Missouri-K-T R. Co.,* 320 U. S. 323, 336.

In this case, however, TCU framed the dispute as one between itself and the Carrier and, as such, the dispute was one which properly invoked the jurisdiction of the Adjustment Board. The form in which TCU framed its claim, however, did not change the basic reality that it actually involved an attempt by TCU to exert jurisdiction over work assigned to employes represented by BRC. *National Labor Relations Board v. Local* 1291, *International Longshoremen's Assn.,* 345 F. 2d 4,8-10 (CA-3, 1965), cert. den. 382 U. S. 891 (1965). Under Paragraph (j) of Section 3, First, therefore, BRC was "involved" in the dispute and, upon being afforded proper notice, its interest also became a proper subject of the Board's jurisdiction.[27] The Adjustment Board here must have recognized this when it gave BRC notice of the proceedings (R. 75). BRC thereby became a full party to the proceedings with respect to the dispute and its interests therein came within the jurisdiction of the Board. Indeed, there would be absolutely no reason for requiring and giving the notice to other "involved" parties unless their interest in the dispute was within the jurisdiction of the Board.

---

[27] *Order of Railway Conductors v. Pitney,* 326 U. S. 561 (1946); *Slocum v. Delaware, L. & W. R.,* 339 U. S. 239 (1950); *Brennan v. Delaware, L. & W. R. R.,* 303 N. Y. 411, 103 N. E. 2d 532 (N. Y., 1952), cert. den, 343 U. S. 977 (1952).

The fact that there was no existing dispute between BRC and Union Pacific and, accordingly, that there had been no handling of such "in the usual manner" did not affect the Board's jurisdiction over their interest. The requirement that there be such a "dispute" which had been "handled in the usual manner" affects only the *invocation* of the Adjustment Board's jurisdiction under Section 3, First (i). Once that jurisdiction attaches it also carries with it jurisdiction under Section 3, First (j) to consider and determine the interests of any other "involved" parties to the extent necessary for the Board to fulfill its obligation under Section 3, First (k) and (l) to make "final awards as to any such dispute."

2. The differences in Section 10(k) of the NLRA and the structure of the NLRB do not negate the congressional intent that the Adjustment Board should also have jurisdiction to adjudicate work-assignment disputes.

TCU contends that the specific provisions in Section 10(k) with respect to deciding jurisdictional disputes and the allegedly more desirable structure in the NLRB for the handling of such disputes indicates that Congress did not intend that the Railway Labor Act vest such jurisdiction in the Adjustment Board (Br. 25-26)

The fact that in Section 10(k) the NLRB was specifically directed to hear and determine jurisdictional disputes does not indicate that the prior and more general language of the Railway Labor Act did not also confer similar jurisdiction upon the Adjustment Board. The legislative history of 10(k), in fact, indicates that in providing for this procedure to avoid strikes over jurisdic-

tional disputes, Congress was but following the lead of the Railway Labor Act. At the time the House of Representatives was considering the report of the conference committee on the bill which included what is now Section 10(k), Representative Gerald W. Landis, a member of the conference committee, indicated the purpose of this legislation, in part, as follows:

> "This conference report will take care of labor abuses without destroying labor's rights. It completely outlaws *jurisdictional strikes,* wildcat strikes and secondary boycotts. However, these are labor evils and abuses and not labor rights.
>
> "In order to stop the strikes which threaten the health and welfare of the Nation *we have set up a plan in many ways, like the Railway Labor Act.* It is a plan to bring the two sides together without harming labor, management, or the public." (93 Cong. Rec. 6386)

The claimed superiority of the NLRB over the Adjustment Board with respect to the ability to go beyond the interpretation of contracts, and its being a single, nonpartisan board, not only does not exist, but would be of no significant importance if it did. In *National Labor Relations Board v. Radio & Television Broadcast Engineers Union,* 364 U. S. 573 (1961), it was also argued that the NLRB was not the type of tribunal to which Congress would have entrusted the resolution of jurisdictional disputes, but that these disputes would be more appropriately handled by arbitration.[28] This Court, however, re-

---

[28] Inasmuch as this Court has held the Adjustment Board to be a form of arbitration, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30, 39 (1957), *Locomotive Engineers v. Louisville & Nashville R. Co.,* 373 U. S. 33, 40 (1963), presumably the NLRB, as appellant in the *Radio Engineers* case, would have felt that the Adjustment Board would be an even more appropriate tribunal for the settlement of jurisdictional disputes than itself.

jected these arguments, stating—

> "* * * But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." (p. 583)

Despite the potential procedural difficulties which were urged in opposition to the NLRB's resolving such dispute, the Court expressed confidence that the Board "with its many years of experience" would "devise means of discharging its duties" under the Act. Similar conclusions would also be appropriate in the case of the Adjustment Board.

II. BRC WAS AN INDISPENSABLE PARTY TO TCU'S ACTION TO ENFORCE ADJUSTMENT BOARD AWARD 9988.

The district court dismissed this action upon TCU's refusal, after being afforded an additional opportunity by the district court (R. 85), to join BRC as an indispensable party (R. 88). The indispensability issue was presented by both parties on appeal. In affirming the dis-

missal, the court of appeals did so on alternate grounds: first, because the Adjustment Board had failed to properly exercise its primary jurisdiction and, second, because of the absence of an indispensable party.

TCU only indirectly discusses this alternative holding and appears to be of the opinion that the court below did not consider the indispensable party issue (Br. 5).[29] In any event, however, the judgment of the court of appeals is fully supported because of TCU's failure to join an indispensable party.[30]

Much latitude is given to employes in actions to enforce Adjustment Board awards under Section 3, First (p) of the Railway Labor Act; nevertheless, it is required that such actions "proceed in all respects as other civil suits." The requirements in the Federal Rules as to indispensable parties are applicable.[31]

The definition as to what parties are indispensable is expressed in the much-cited case of *Shields v. Barrow,* 21 U. S. 409, 411, 17 How. 130, 139 (1854):

> "* * * Persons who not only have an interest in the controversy, but an interest of such a nature that

---

[29] *Amicus* RLEA does not discuss the indispensable party issue at all.

[30] *Langnes v. Green,* 282 U. S. 531, 538-539 (1931); *U. S. v. American Ry. Exp. Co.,* 265 U. S. 425, 435 (1924); *Stelos Co. v. Hosiery Motor-Mend Corp.,* 295 U. S. 237, 239 (1935).

[31] Rule 19 of the Federal Rules of Civil Procedure was amended effective July 1, 1966, after the date of the court of appeals' decision in this case. (Appendix A, *infra,* p. 16a.) According to the Advisory Committee Notes, the list of factors which the Rule specifies should be considered in determining whether an action should be dismissed because an interested person cannot be made a party are merely "relevant considerations drawn from the experience revealed in the decided cases." It has been suggested therefore that while amended Rule 19 may offer "a clearer guide" to the courts, it "does not make any basic change in substance." 3 Moore, Federal Practice (1966 Special Supplement), pp. 19, 21.

> a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The tests to be applied are detailed in *Washington v. U. S.*, 87 F. 2d 421, 427 (CA-9, 1936). The court also pointed out that "the nonjoinder of an indispensable party is fatal error, and the court cannot proceed to a decree in the absence of such indispensable party [p. 428]."

TCU has not disputed the applicability of the traditional tests of indispensability of parties to an enforcement action under the Railway Labor Act. *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F. 2d 59, 67 (CA-8, 1956), cert. den. 350 U. S. 997 (1956). TCU simply argues that BRC is not indispensable.

A. BRC has a real and substantial interest which could be directly affected by this case.

1. Enforcement of award 9988 as sought by TCU would require a transfer of work from clerks to telegraphers.

This point has been discussed under Part I, D. See page 44, *supra*.

2. The clerks have a substantial interest in any action which could deprive them of work.

Since clerical employes are now performing the work, over and above any actual enforceable right they might have to such work, they have at least what might

be termed a "possessory interest" therein which could be directly affected by this litigation. This interest is a substantial one and is entitled to protection. *Truax v. Raich,* 239 U. S. 33 (1915). *Brotherhood of Railroad Trainmen v. Templeton,* 181 F. 2d 527 (CA-8, 1950); *Hunter v. Atchison, T. & S. F. Ry. Co.,* 171 F. 2d 594 (CA-7, 1948), and *Allain v. Tummon,* 212 F. 2d 32 (CA-7, 1954).

In any event, even enforcement of Award 9988 limited to the money portion alone would still have a declaratory effect which could substantially impair the opportunities and rights of clerical employes to the performance of this work in the future. Such an order would have the effect of a declaratory judgment as to the right of telegraphers to perform this work. The fact that such an order would not be binding upon parties not included in the action, still could have such an effect as to require their presence in the proceeding. Under somewhat similar circumstances, it was stated in *Green v. Brophy,* 110 F. 2d 539, 543 (CA-D. C., 1940):

> "* * * We do not here find it necessary to pass upon the question of whether such decree would be res adjudicata against the union and its former membership in respect to their legal relationship to the defendant, or their claims to the funds in question, for that is not decisive of the status of the union or its former membership as indispensable parties. See *California v. Sou. Pac. Co., supra* [157 U. S. 229, 255]. *It is sufficient to note that such a decree would plague the union or its former members in any subsequent suit against either the defendant or the plaintiff in respect of these funds.*"

We have already referred to *Order of R. R. Telegraphers v. New Orleans T. & M. Ry.*, 229 F. 2d 59 (CA-8, 1956), cert. den. 350 U. S. 997, where the Court of Appeals for the Eighth Circuit affirmed the dismissal of an enforcement action brought by TCU to enforce an award of the Adjustment Board sustaining its claim to certain work performed by employes represented by BRC both because the latter had not been given proper notice of the Adjustment Board proceedings and because it had not been made a party to the enforcement action.

> "* * * It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' (cases cited) Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. has not modified the requirement as to indispensable parties * * * and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done." (p. 67)

TCU discusses the *N. O. T. M.* case at some length (Br. 13-16) as expressing the view that the "relief sought before the Adjustment Board in disputes similar to that involved in this case is of importance in determining whether the presence of other parties before the Adjustment Board and the court is required [Br. 13]." TCU would distinguish that case, first, because in *N. O. T. M.* both Clerks and Telegraphers had in fact specifically claimed the work whereas here only TCU has specifically

done so; and, second, because in that case the assignment of the work was specifically sought by TCU whereas here only monetary compensation was sought (Br. 15-16). These differences, TCU argues, renders the *N. O. T. M.* case inapposite here.

Whether or not BRC had filed a claim to the work involved is certainly not a required element to its being an indispensable party to this enforcement action. Of course, no claim has been filed by BRC because clerical employes are performing the work and have not yet been dispossessed. This does not, however, suggest that it has no interest in this work. It is the actual interest in the work, and not the formal expression of that interest, which forms the basis of indispensability.

Nor does it follow that merely because the BRC has not filed any formal claim to this work that there was no evidence of its interest therein. In addition to the obvious possessory interest, previously discussed, BRC formally advised the Adjustment Board and Union Pacific that if work were taken from employes represented by BRC, it would proceed against Union Pacific to reclaim the work (R. 77).

It should also be noted that in the prior Third Division Award No. 8656 (83 N.R.A.B. (3d Div.) 337), between these same parties and involving the same dispute, it had previously been held that this identical work was properly assigned to and performed by Union Pacific's clerical employes (R. 49). The Clerks might well have premised a claim of a right to perform this work under that prior award.

Moreover, while in the *N.O.T.M.* case the Clerks had not been given any notice of the Adjustment Board proceedings, in this present case, the Board had already found that the Clerks were "involved" in the dispute under the provisions of Section 3, First (j) and BRC was in effect made a party to the proceedings in recognition of their interest. This particular factual difference with the *N.O.T.M.* case would reinforce the applicability of the *N.O.T.M.* decision, and afford an even greater reason for the conclusion that BRC was indispensable to this enforcement proceeding.

When the already close parallel of facts in the *N.O.T.M.* case is considered together with the other decisions on the requirements of indispensability, its independent holding that BRC was an indispensable party clearly supports the similar conclusion in this case.

B. The limitations of the Gunther case and P. L. 89-456 do not affect BRC's indispensability.

TCU argues (Br. 34) that inasmuch as the Adjustment Board had jurisdiction to rule on the dispute presented by it, Award 9988 should, therefore, be enforced since "[n]o other defect is alleged or can be made the basis of attack on the Award," citing *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U. S. 257, 15 L. ed. 2d 308 (1966), and P. L. 89-456 (80 Stat. 208, approved June 20, 1966), *infra,* p. 12a.

Both decisions below were rendered prior to this Court's decision in *Gunther* and the enactment of P. L. 89-456. However, neither *Gunther* nor P. L. 89-456 con-

templated that the District Court in an enforcement action would be limited to adjudicating matters having to do with the jurisdiction of the Adjustment Board.

This Court's decision in *Gunther* was limited to a holding that the Railway Labor Act, prior to P. L. 89-456, did "not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award." (15 L. ed. 2d at 313). But this Court did not suggest that the district court would not have jurisdiction to adjudicate other "non-merit" issues concerning the validity or enforceability of the award.

Public Law 89-456 precludes a review of the merits of an Adjustment Board Award in an enforcement action. But Section 2(e) still preserves the jurisdiction of the district court to adjudicate and take appropriate action, among other things, "for failure of the division to comply with the requirements of [the Railway Labor] Act."

Thus, had BRC been properly joined it could have raised and had adjudicated any position it might have with respect to whether the procedure and other conduct of the Adjustment Board was in compliance with the provisions of the Railway Labor Act.[32]

The most obvious issue on which BRC has a right to be heard and adjudicated is that which is discussed in Section I of this brief, i. e., whether the Adjustment

---

[32] There is, of course, in any enforcement action the "crucial question" as to whether the award sought to be enforced was validly made. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 720 (1945).

Board acted improperly in failing to consider BRC's interest in the dispute. Other matters, which have not been litigated but which would be proper issues and which BRC would have the right to raise, argue and have adjudicated in the enforcement action even under the recent amendments are:

¶ Whether under Section 3, First (m) the Adjustment Board's prior Award No. 8656, covering the same dispute between the same parties, was "final and binding" and thus precluded the contrary decision in its present Award 9988.

¶ Whether the notice given BRC by the Adjustment Board as to the pendency of TCU's claim was sufficient under Section 3, First (j) to properly apprize BRC of the real nature and potential effect of an award on such claim.

There are also other potential issues affecting BRC's interests which could arise in the enforcement proceeding which it might wish to oppose or dispute from a defensive standpoint. These issues have already developed in these proceedings, raised by both TCU and Union Pacific:

¶ TCU has intimated that BRC, by failing to participate in the Adjustment Board proceedings, in effect waived any interest it may have had to the work involved.

¶ Union Pacific has contended that even though BRC chose not to participate in the Adjustment Board proceedings, it would, if properly noticed, still be bound by the award. (See the court of appeals'

first opinion reported unofficially at 59 LRRM 2993, 2996.)

¶ Despite the request in the complaint that the award be enforced "by writ of mandamus or otherwise" (R. 4), TCU has contended that it actually seeks only money damages (Br. 12). BRC would seem to have an enforceable interest in avoiding any construction of the award or the issuance of any judgment directing that the work itself be performed by telegraphers rather than clerks.

Of course, it is not known what issues or positions BRC would actually have raised if it had been made a party to the action, nor should it be inferred that Union Pacific would necessarily agree that all of the above positions or others which might have been advanced by BRC would in fact have been valid. Such positions and perhaps others, however, are ones which BRC might reasonably have taken in its own interest, and are ones which the district court would have jurisdiction to consider and rule upon in the enforcement action even under *Gunther* and the recent amendments.

C. BRC's presence in the enforcement action was necessary to protect Union Pacific in its compliance with any decree or judgment.

From Union Pacific's standpoint, whatever position or issue BRC may have sought to have adjudicated if it had been made a party in the enforcement action is not so important. It is important, however, that BRC be a party to the enforcement action in order to assure that BRC would be bound and Union Pacific protected in its

subsequent compliance with any judgment or decree of the district court.

Where, as here, a union claims the exclusive right of employes it represents to work performed by employes represented by another union, the railroad-employer has the right under Section 3, First (j) that the union representing the other employes be made a party to the Adjustment Board proceedings in order to assure that any such decision would be *res judicata* and binding upon all parties. *Allain v. Tummon,* 212 F. 2d 32, 36 (CA-7, 1954); *Kirby v. Pennsylvania R. Co.,* 188 F. 2d 793, 799 (CA-3, 1951).

In the *Kirby* case, which was an enforcement action, it was held that the railroad had the right to raise the question of failure of such other parties to be given notice and to be able to participate in the Board action in order to assure itself of protection should it be compelled to comply with the award. It was there stated:

> "If the carrier is not permitted to raise the question of notice to employees, it is in a dilemma in deciding whether to comply with a Board order. If it complies, it may be exposed to suit by the ousted employees for back pay and reinstatement. If it refuses to comply it may increase the amount of back pay owed the claimants. Either way it runs the risk of paying two groups of employees for the same work. * * *
>
> "* * * We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustdent Board. *A party is entitled to an award that will protect it in the event that it complies.*" (pp. 798-799)

A fortiori, the railroad is entitled to the same right in an enforcement action where the court has been asked to compel compliance.

The fact that, in the absence of a party, the adjudication would not bind it or prevent it from relitigating the controversy, is an important consideration in holding that such absent party is indispensable to the action. *Shields v. Barrow,* 17 How. 130, 139 (1854); *State of California v. Southern Pac. Co.,* 157 U. S. 229, 255 (1895); *Fitzgerald v. Haynes,* 241 F. 2d 417, 419 (CA-3, 1957).

CONCLUSION

For the reasons and authority set forth above, the decision and judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

F. J. Melia
James A. Wilcox
H. Lustgarten, Jr.
1416 Dodge Street
Omaha, Nebraska 68102
Counsel for Respondent

October 1, 1966

BLANK

PAGE

APPENDIX A

Relevant Statutory Provisions

---

1. THE RAILWAY LABOR ACT

Being an act to provide for the prompt disposition of disputes between carriers and their employes and for other purposes.

(Pub. No. 257, 69th Cong., approved May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., approved June 21, 1934, 48 Stat. 1185, 45 U. S. C., ch. 8, sec. 151, et seq.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

* * * * *

GENERAL PURPOSES

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

* * * * *

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

* * * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after

the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall desig-

nate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * *

Section 3.

NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, cler-

ical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * * *

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award

includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional

boards shall be designated in keeping with the rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board. * * *

* * * * *

Section 5.

FUNCTIONS OF MEDIATION BOARD

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * *

2. THE NATIONAL LABOR RELATIONS ACT

AN ACT

To Amend the National Labor Relations Act, to Provide Additional Facilities for the Mediation of Labor Disputes Affecting

Commerce, to Equalize Legal Responsibilities of Labor Organizations and Employers, and for Other Purposes.

(Public Law No. 101, 80th Congress of the United States, Chapter 120, First Session, H. R. 3020, Passed June 23, 1947, over the President's Veto.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Section 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

HEARINGS ON JURISDICTIONAL STRIKES

Section 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

• • • • •

3. PUBLIC LAW 89-456

(80 Stat. 208 amending Section 3 of the Railway Labor Act.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the

date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the

consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

Sec. 2 (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award".

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties".

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period

at the end thereof the following: ": *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order".

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as paragraphs (r) through (x), respectively, and by inserting after paragraph (p) the following new paragraph:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the

order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

Approved June 20, 1966.

4. RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

(Prior to amendments eff. July 1, 1966)

NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth

the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

(As amended Feb. 28, 1966, eff. July 1, 1966)

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)—(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might

be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)—(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966.

---o---

APPENDIX B

Excerpts from Findings of Fact entered by the United States District Court, Northern District of Illinois, Eastern Division in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, Civil Action No. 50 C 684, 128 F. Supp. 331:

"64. ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board procedure and joining BRC and other labor organizations in the following agreement:

> 'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the

event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decisions of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'

"This was the same procedural program previously advocated by the BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board.

* * * * *

"156. In disputes such as those involved in Awards 3932, 3933, 3934, 4735, and 5014, it is the settled custom and practice of the Board:

"(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim.

"(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board.

"(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim.

"(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing.

"(e) Not to permit anyone to intervene.

"(f) Not to recognize anyone as a party to a proceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so.

"157. The settled custom and practice of the Board, described in Finding 156, is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard.

"158. The position of the labor members of the Board, described in Finding 157, is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor Executives Association and who select, control and discipline the labor members of the Board.

"159. The carrier members of the Board are opposed to its settled custom and practice described in Finding 156. It is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board.

"160. The conflicting positions of the labor members and of the carrier members of the Board make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees.

"161. Referees appointed to break deadlocks as to notice and hearing are divided in their opinions. Some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given.

"162. These divergent views and actions of the Board members and the referees, described in Findings 158 to 161, have produced an administrative deadlock, stalemate and frustration on the Board. The carrier members have asked for judicial guidance."

Note: The letters "ORT" in the foregoing referred to The Order of Railroad Telegraphers now changed to Transportation-Communication Employees Union. The letters "BRC" referred to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

APPENDIX C

Policy Declaration of Railway Labor Executives' Association and excerpt from Answer to Interrogatory No. 1, in *The Order of Railroad Telegraphers v. Southern Pacific Company,* No. Civ. 4812-Phx, pending in the U. S. District Court for the District of Arizona.

"Following the decision of the Supreme Court in March 1956, refusing to grant certiorari in the case of *O. R. T. v. N. O. T. & M. Ry. Co.*, 350 U. S. 997, the Organizations whose Chief Executives were affiliated with the Railway Labor Executives' Association decided to review their policy position that neither the Railway Labor Act nor the Constitution of the United States required the divisions of the National Railroad Adjustment Board to serve third party notices.

"In June 1959, the Chief Executives affiliated with the Railway Labor Executives' Association agreed to a Policy Declaration that they would no longer oppose the issuance of third party notices by the divisions of the National Railroad Adjustment Board, and that each Organization receiving a third party notice would reply to such notice in substan-

tially the same manner set forth in a proposed letter attached to the Policy Declaration. A copy of the Policy Declaration with attachment is attached hereto as Exhibit 1."

Policy Declaration Agreed Upon by Chief Executives Affiliated with Railway Labor Executives' Association

The standard Railway Labor Organizations have consistently taken the position that neither the Railway Labor Act nor the Constitution of the United States require the National Railroad Adjustment Board to serve a so-called "third party notice" except in a few isolated instances. The carrier and the carrier members of the Adjustment Board have just as consistently maintained that such notices must be given in all cases where a decision of the Board may conflict with any alleged claim or interest of an employee or labor organization not initially a party to the Board's proceedings.

The lower courts for the most part, have rejected the contention of the labor organizations even in those cases where the alleged third party interest is subject to the jurisdiction of a different division of the Board and the Railway Labor Executives' Association has been unable to obtain a review of these decisions by the United States Supreme Court.

The members of the Railway Labor Executives' Association have agreed that continued opposition to the issuance of the third party notice would be futile and costly whether or not it involves employees whose rights are subject to the same or different divisions of the Board. It has also been agreed that by abandoning our opposition to the granting of a third party notice, the affiliated organizations are not receding from their position that the Board is without authority to adjudicate any rights of any such third party which arises under an agreement different from the one the interpretation or application of which is sought in the initial submission to the Board. In other words, we are maintaining our position that the

Board is not empowered to reconcile conflicting agreements or render any decision which will conflict with the rights of such third parties or their representatives to have the collective bargaining agreements interpreted and applied in proceedings initiated by them.

For the purpose of implementing this policy, all affiliated organizations have agreed as follows:

(a) That third party notices should be issued by all divisions of the Adjustment Board in each case where the carrier members of the Board requests it and in any other case in which the submissions of the parties disclose the existence of an interest in third parties whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board, and

(b) That each organization receiving a third party notice shall reply to such notice substantially in the manner set forth in a proposed letter which is attached hereto as Exhibit A and shall not otherwise appear or participate in the proceeding.

The foregoing procedure was adopted to expedite the handling of third party notice cases and to avoid litigation which appears to have little hope of success in view of the precedents already established.

—o—

Exhibit A

.....Executive Secretary
National Railroad Adjustment Board

.....Division
220 South State Street
Chicago 4, Illinois

Dear Mr.....:

I acknowledge receipt of your letter of..... giving notice of the pendency of the following dispute before the.....Division, National Railroad Adjustment Board:

(Quote description of claim as stated in notice)

You advise that said dispute bearing Docket No..... will be heard at....., on....., at the headquarters of the.....Division of the National Railroad Adjustment Board, Room....., Consumers Building, 220 South State Street, Chicago, Illinois.

From the description of the dispute set forth in your letter, it would appear that this is a dispute between the (Carrier) on the one hand and the (petitioning organization) on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employees represented by (petitioning organization). If this understanding is not correct, I would appreciate being further advised.

If my understanding of the nature of the dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the (organization) nor the employees it represents are involved in such a dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier and the representative of such other craft. The rights of employees represented by the (organization) are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employees not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employees we represent against any loss resulting from any such violation.

Very truly yours,

BLANK

PAGE